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THE RICO STATUTE:
AN OVERVIEW OF U.S. FEDERAL
AND STATE RICO LEGISLATION

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Secretariat

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THE RICO STATUTE: AN OVERVIEW OF U.S. FEDERAL AND STATE RICO LEGISLATION

No. 1984-12

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FOREWORD

The purpose of the document is to provide as much information as possible about the American experience with RICO statutes to members of the Federal-Provincial Task Force on Enterprise Crime and other officials who may be involved in the development of legislation to combat organized criminal activities. This report provides a synthesis of the literature, points out contradictions in interpretations among the main references and examines the concept of the RICO statute from a broad perspective.

I. THE RICO STATUTE: AN OVERVIEW

The stated objective of Title IX of the Organized Crime Control Act of 1970, "Racketeer Influenced and Corrupt Organizations (RICO),"[1] was "to seek the eradication of organized crime in the United States." The RICO statute was intended to enable law enforcement authorities to combat the influence of organized crime in legitimate business operations, but it applied to anyone who committed the proscribed acts, whether or not that individual was a member of "organized crime." In addition to criminal prosecution, the RICO statute allowed for civil prosecution by the state and by private individuals.

RICO does not create a new type of crime, because acts punishable under RICO are already punishable under existing federal and state statutes. The statute incorporates, by reference, twenty-four separate types of federal crimes and eight types of state felonies as defined under "racketeering activities" in RICO Section 1961.[2] The statute identifies these federal and state crimes and declares that a person who commits two or more of these offences within a ten-year period has been involved in a "pattern of racketeering." The prosecution must then prove that a connection existed between a "pattern of racketeering" and an interstate or foreign enterprise.

The elements of RICO offenses may be summarized as follows:

1) it is unlawful for any person[3]
2) through a pattern[4]
3) of racketeering activity[5]
4) or collection of unlawful debt[6]
5) directly or indirectly to invest in, or maintain an interest in, or participate in,
6) an enterprise,[7]
7) the activities of which affect interstate commerce.

II. PROSECUTING UNDER RICO

By identifying, isolating, and focusing on four specific types of criminal infiltration, the RICO statute provides prosecutors with a method of attacking the economic investment base of organized crime. The principal provision of the RICO statute, Section 1962, defines the four types of criminal activity encompassed by the Act.

SECTION 1962(a): LEGAL ACQUISITION WITH ILLEGAL FUNDS

Section 1962(a) proscribes the acquisition, with any income derived from an illegal activity, of any interest in, or the establishment or operation of, any enterprise that affects interstate commerce.[8] The crux of the offense is the illegal derivation of the capital; the acquisition may be completely legal. Subsection (a) is thus confined to situations in which there has been a legal acquisition with illegal funds derived from a pattern of racketeering activity or the collection of an unlawful debt in interstate or foreign commerce. The evidentiary problem is that the income must be traced from the racketeering activity to the principal's investment in the enterprise, through the defendant's often inadequate or falsified records. As a result of these limitations, this section is rarely used.[9]

However, when Section 1962(a) has been used, the courts have applied a liberal construction of the law. This is illustrated in the leading case, U.S. v. McNary (1980). McNary, a public official, accepted bribes over a period of years. Part of the money he received was deposited directly into the bank account of a company he owned. Subsequently, money from that account was transferred into the account of a travel agency in which McNary had an interest. This transfer of "tainted" money was held to be a violation of Section 1962(a). McNary was required to forfeit his interest in the travel agency.

It should be noted that it was not necessary to show that the actual "tainted" money was invested in an enterprise, but only that the investment was facilitated or made possible by the availability of the illegal funds. Whether "tainted" money remained in McNary's business account while "clean" money was transferred to the travel agency was irrelevant.

SECTION 1962(b): ACQUISITION BY ILLEGAL MEANS

Section 1962(b) prohibits the acquisition or maintenance of any interest in or control of any enterprise through a pattern of racketeering activity or loan sharking.[10] The gist of the offence is the illegal acquisition or maintenance of an interest or control. Thus, in contrast to Section 1962(a), which is focused on strictly legal acquisitions, Section 1962(b) requires proof of an illegal "takeover" of an enterprise through bribery, extortion, a scheme to defraud, or similar criminal activity. For example, the defendant in U.S. v. Parness, 503 F.2d 430 (2d Cir. 1974)[11] gained control of a foreign casino/hotel through a scheme to defraud the majority (90%) stockholder. The defendant first illegally withheld funds due the hotel, which forced the owner to borrow from third parties, then loaned the stockholder the funds to meet the third party obligations, and then foreclosed on the debt.[12]

The prosecution proved five elements in establishing the Section 1962(b) violation:

- the interstate transfer of stolen property (3 counts);
- the commission of the interstate stolen property crimes within a ten-year period;
- the interconnection of the interstate transfer of stolen property offenses through the common scheme to defraud the hotel owner, so as to constitute a "pattern of racketeering" and not just a series of unconnected acts;

- that through the "pattern of racketeering activity" the defendant acquired control of the hotel/casino;
- that the casino was engaged in interstate or foreign commerce.

The defendant was sentenced to ten years concurrent on each count and was fined $55,000. No criminal forfeiture of the hotel/casino was attempted because the holder of a second mortgage foreclosed on the operation soon after the indictment.

SECTION 1962(c): ILLEGAL USE OF AN ENTERPRISE

Section 1962(c) prohibits the use of an enterprise in a pattern of racketeering activity or in the collection of unlawful debts. It is aimed at individuals who, through employment or association with others, use an enterprise to conduct unlawful activities.[13] Section 1962(c) encompasses two sorts of illegal activity:

1) control by a criminal syndicate of a business or financial organization;
2) instances when the "enterprise" is a group of individuals associated for the purpose of engaging in criminal conduct.

Courts have interpreted the word "enterprise" in widely varying ways, so that many entities other than actual businesses have been found to be "enterprises" within the meaning of Section 1962(c), e.g., a county judge (U.S. v. Grant, 622 F.2d. 308); a prison warden (U.S. v. Davis, 576 F.2d 1065); a labour union (U.S. v. Scotto, 641 F.2d. 47); and a business serving as a front for narcotics trafficking (U.S. v. Swiderski, 593 F.2d. 1246). Defendants argue that problems of interpretation arise due to vagueness, but the courts have upheld the statute.[14]

The case of U.S. v. Brown, 555 F.2d 407, provides an example of the first type of illegal control under Section 1962(c). Members of a police force accepted bribes from prostitutes, gamblers and illegal distillers. The prosecution established five elements of the Section 1962(c) violation:

- the officers committed several bribery and obstruction of justice offences, i.e., "a pattern of racketeering activity" was evident;
- the offences were committed within a ten-year period;
- the offences were connected by a common scheme--using the powers of the police department as a means to collect illegal payments;
- the offences were committed through the conduct of an "enterprise," i.e., the police department;
- the enterprise affected interstate commerce.

The case of U.S. v. Hansen, 422 F. Supp. 430 (1976), is an example of the second type of illegal control under Section 1962(c). The "enterprise" is a group of people associated to engage in criminal activity. The defendants purchased buildings, increased the apparent value of the properties by selling them to associates for more than market value, obtained inflated insurance coverage, removed all valuables, burned the buildings and collected the insurance. The prosecution established five elements of a Section 1962(c) violation:

- repeated arson and mail fraud constituted "a pattern of racketeering activity";
- the offences occurred within a ten-year period;
- the offences were connected by a common scheme--defrauding insurance companies;
- the "enterprise" was a group of individuals associated for the purpose of defrauding insurance companies;
- the activities affected interstate commerce.

SECTION 1962(d): CONSPIRACY TO VIOLATE RICO

Section 1962(d) makes conspiracy to violate subsections (a), (b) or (c) subject to the same penalties as the substantive offences.[15] Thus, Section 1962(d) proscribes conspiracy to violate a substantive RICO provision and not merely to commit each of the predicate crimes necessary to demonstrate a pattern of racketeering activity. Unlike traditional conspiracy law, RICO allows for the joint prosecution of those accused of participating in the affairs of a pattern of racketeering within an enterprise, even though agreement to every crime cannot be shown.[16] The courts, in a series of decisions, have set out what is required to prove the existence of a RICO conspiracy.

In U.S. v. Elliot, 571 F.2d 880 (1978), the 5th Circuit Court of Appeals held that a group of six defendants who could not have been tried for a single conspiracy to violate any particular predicate crime could nevertheless be tried for a single conspiracy to violate RICO. The "enterprise" was a loosely formed association of the six individuals, who were guilty of arson, murder, theft, highjacking, etc. There was an absence of interaction between the sub-groups. The Court of Appeal decided that, unlike traditional conspiracy law, a RICO conspiracy did not require proof that all the defendants had agreed on the commission of the separate crimes, but only that each defendant agreed directly or indirectly to participate in the affairs of the enterprise by committing two or more predicate crimes. It was irrelevant that each defendant participated in the enterprise through different, even unrelated crimes so long as it could reasonably be inferred that each crime was intended to further the enterprise. This becomes problematic when the enterprise, as in this case, becomes nothing other than the network of offenses and motives of individuals.

In U.S. v. Sutherland, F.2d 1181 (1981), cert. denied 102 S. Ct. 1451 (1982), the 5th Circuit Court of Appeals had occasion to further consider its decision in Elliott as it pertained to the nature of a RICO conspiracy. In Elliott it had been decided that:

> 1) "a pattern of agreements that absent RICO would constitute multiple conspiracies may be joined under a single RICO conspiracy count if the defendants have agreed to commit a substantive RICO offense;
>
> 2) such an agreement to violate RICO may, as in the case of a traditional "chain" or "wheel" conspiracy, be established on circumstantial evidence, i.e., evidence that the nature of the conspiracy is such that each defendant must necessarily have known that others were also conspiring to violate RICO". [at p. 1197]

In order to have a RICO conspiracy, the nature of the scheme must be such that it can be inferred that each defendant knew that the others also were conspiring to participate in the same enterprise through a pattern of racketeering activity. The prosecution must prove that some "overt act" was taken in furtherance of conspiracy to commit a substantive crime, and, in particular, must show that at least one conspirator committed at least one overt act in furtherance of the conspiracy. The overt act is not required to constitute a substantive crime. Moreover, even if the act was seemingly innocent in itself, it is sufficient to support a conspiracy conviction if it is taken in furtherance of the conspiracy. However, someone cannot be joined in a RICO conspiracy who neither participated in nor knew that others were participating in the racketeering activities.

The 5th Circuit Court has thus reasoned that a RICO conspiracy requires that the prosecution show an agreement exists, or may be inferred, among all of the conspirators to commit the substantive RICO offence (participate in the affairs of the enterprise by committing two or more predicate crimes).

The 1st Circuit Court of Appeals has taken a more strict view of what is required to prove a RICO conspiracy. In U.S. v. Winter, 663 F.2d 1120 (1981) it was held that each individual charged must agree personally to commit two acts of racketeering. It is not enough to agree that someone else commit two acts of racketeering, i.e., this court held that the RICO conspiracy section does not enable the prosecution to focus on the activities of the group or enterprise and then convict an individual because he was associated with the group. Guilt in a conspiracy must still be individual and personal and proven beyond a reasonable doubt.

Another aspect of the RICO conspiracy concept was addressed in U.S. v. Anderson, 626 F.2d 1358 (1980). The defendant entered into separate agreements with two county judges to defraud their respective counties. The court held that there had to be separate proof of the existence of the enterprise as well as proof of the conspiracy to illegally invest, illegally take over, or illegally conduct the enterprise. There had to be proof of the existence of an "enterprise" which was separate from the "pattern of racketeering activity".

This "strict" interpretation requires the following elements to prove the existence of a conspiracy:

1) At least two persons...

2) Conspiring to illegally invest, illegally take over, or illegally conduct...

3) Through a pattern of racketeering activity...

4) An enterprise.

III. THE COURTS AND RICO: DEFINING THE TERMS

The RICO statute has been challenged on the grounds that it is too vague, with ill-defined concepts.

ENTERPRISE: SECTION 1961(4)

Enterprise is a key element of RICO. This section has been the most litigated issue under the RICO statute over the past several years. Prosecutors must prove that the accused has acquired or maintained an interest in or control of an enterprise, or participated in or conducted the affairs of an enterprise. Either direct or indirect involvement of the defendant in the varied levels of enterprise activity constitutes a violation. The statute defines enterprise as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[17] Despite liberal construction and broad definitions, this provision of the RICO statute has been ruled to be constitutional.[18]

Some courts have required only two elements to establish an enterprise:

- at least two persons...
- committing at least two racketeering offences.

For example, six persons committed various random criminal acts, sometimes alone, sometimes in groups of two or three, but never as a group. Some of the individuals did not know one another, and many of the crimes were unrelated. Nevertheless, in U.S. v. Elliott, 571 F.2d 880 (5th Cir. 1978), the court held that this "network" was an enterprise. In another case, two men committed three murders and two extortions. The court, in U.S. v. Rone, 598 F.2d 564 (9th Cir. 1979), held that this association constituted an enterprise.

Other courts have been more restrictive, demanding additional evidence to establish an enterprise:

- at least two persons...
- committing at least two racketeering offences...
- within a structured organization.

Thus in U.S. v. Anderson, 626 F.2d 1358 (8th Cir. 1980), a case involving a salesman who made separate agreements with two county judges to defraud their respective counties, the court held that evidence showing that some individuals had exhibited a pattern of racketeering activity did not prove the existence of an enterprise. There had to be proof of an enterprise that was separate from the racketeering activity, i.e., "an ascertainable structure which exists for the purpose of maintaining operations toward an economic goal."

Recently, in U.S. v. Turkette, 101 S. Ct. 2524 (1981), the U.S. Supreme Court decided that the prosecution must prove specifically and separately the existence of both an "enterprise" and "a pattern of racketeering activity." To establish the existence of an enterprise, the prosecution must identify either a formal or an informal ongoing organization in which the associates functioned as a continuing unit.

There is now a broad consensus that the RICO statute is directed against legal as well as illegal entities. Although the appellate court in U.S. v. Sutton, 605 F.2d 260 (1979) held that RICO applied only to legitimate enterprises, the same court, sitting en banc (ten justices) a year later, vacated its earlier decision and upheld the trial court decision that RICO applied to both legitimate and illegitimate enterprises. Moreover, in 1981 the Supreme Court held in U.S. v. Turkette that both legitimate and illegitimate enterprises fell within the scope of the statute. The court held that nothing in the legislative history, or on the face of the statute, indicated the intent of the Congress to limit RICO to wholly legitimate enterprises.[19]

RICO's major purpose--combatting the influence of organized crime within legitimate businesses, does not bar its further application to criminal enterprises. Rather, the court concluded, it would be senseless to ignore the organized crime problem at its very source or to fail to penalize persons committing illegal acts within an illegal environment. Therefore an enterprise could be composed of persons associated solely for wholly illicit activities.

The potential for the relationship between "enterprise" and "pattern of racketeering" to become tautological has been recognized. If the illicit enterprise is not something distinct from the pattern of racketeering then the two concepts are synonymous, the result being that the criminal behaviour would, by itself, allow for a RICO prosecution, without the separate existence of an enterprise. It is this relationship of the pattern to the enterprise which serves to justify the treble sanctions and to avoid the constitutional prohibition against double jeopardy. This difficulty has been overcome by the Turkette decision, which, as noted above, requires that the prosecution establish the existence of an enterprise, a pattern of racketeering activity, and either a formal or informal ongoing organization in which the members function as a continuing unit.

Failure to allege and prove an enterprise is fatal to the indictment because the enterprise element is critical to a RICO charge. The broadening of the interpretations of these concepts was therefore crucial in moving the focus of RICO from the infiltration by organized crime into purely legitimate enterprises, to the prosecution of white collar/corporate criminals and isolated individuals involved in illicit enterprises.

Other sections of the RICO statute that have been criticized for being vague are: interpreting whether or not the defendant was aware of the enterprise with which he was associated (18 U.S.C. Chapter 1961(9) (1979)); the scope of the interests or property rights to be forfeited; and the definition of what constitutes an "interest" or "property right" subject to forfeiture under RICO (18 U.S.C. 1963(a) 1970)).

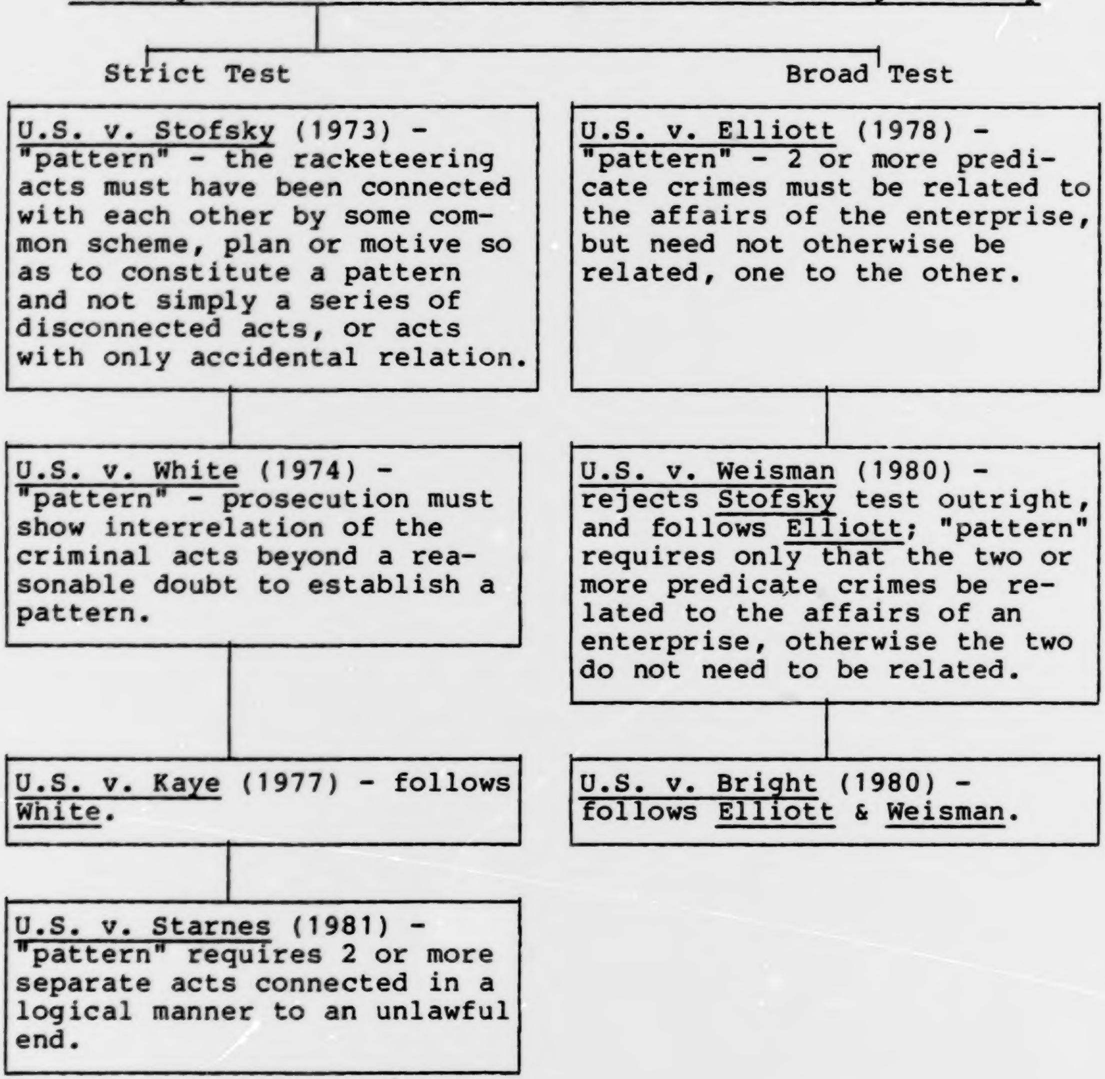
PATTERNS OF RACKETEERING: SECTION 1961(5)

"Pattern of racketeering" is a necessary element for a RICO conviction. For a RICO prosecution to be successful, the prosecution must establish that the accused was involved in a pattern of racketeering. The purpose of this provision of the statute is to prosecute those who have perpetrated at least two predicate acts within ten years of each other, with at least one of those acts occurring after the effective date of RICO.

The statute does not indicate what conduct constitutes a pattern, in either Section 1961(5), which discusses pattern in quantitative terms only, or in section 1962, which uses "pattern" as an element of the crime charged. The interpretation and application of this essential RICO element has given rise to judicial confusion and contradiction.[20]

The positions various courts have taken in defining "pattern" are illustrated in the diagram on the following page.

Meaning of "Pattern" in "Pattern of Racketeering Activity"



Strict Test

U.S. v. Stofsky (1973) - "pattern" - the racketeering acts must have been connected with each other by some common scheme, plan or motive so as to constitute a pattern and not simply a series of disconnected acts, or acts with only accidental relation.

U.S. v. White (1974) - "pattern" - prosecution must show interrelation of the criminal acts beyond a reasonable doubt to establish a pattern.

U.S. v. Kaye (1977) - follows *White*.

U.S. v. Starnes (1981) - "pattern" requires 2 or more separate acts connected in a logical manner to an unlawful end.

Broad Test

U.S. v. Elliott (1978) - "pattern" - 2 or more predicate crimes must be related to the affairs of the enterprise, but need not otherwise be related, one to the other.

U.S. v. Weisman (1980) - rejects *Stofsky* test outright, and follows *Elliott*; "pattern" requires only that the two or more predicate crimes be related to the affairs of an enterprise, otherwise the two do not need to be related.

U.S. v. Bright (1980) - follows *Elliott* & *Weisman*.

- Currently this seems to be the minority view of what the test for "pattern" should be.

- Currently this seems to be the majority view of what the test for "pattern" should be.

The majority of U.S. courts currently apply the "loose test" in defining a pattern. However, two of the most recent decisions (Starnes, Dean) indicate that some U.S. courts still apply the "strict test". In U.S. v. Dean, 647 F.2d 779 (8th Cir. 1981) the court used a five-factor test to find a "pattern":

1) time within which the activities took place;
2) identity of persons participating;
3) statutory offences charged;
4) nature and scope of the activities;
5) locations of the activities.

In using the foregoing test the court appears again to be looking for some interrelation between the criminal acts in question. Thus the court seems to be falling back on the Stofsky test--looking for a common scheme, plan, or motive--or trying to incorporate the holding in U.S. v. Starnes, that the two or more acts be connected in a logical manner to an unlawful end.

Overall, the cases suggest that U.S. courts have not finally decided how broad the scope of RICO should be. The courts are concerned that if "pattern" is defined too loosely, some crimes and some individuals, never intended to come under RICO sanctions, will be subject to prosecution under its provisions. For example, as stated in U.S. v. Huber, 603 F.2d 387 (2d Cir. 1979) at 395, "the potentially broad reach of RICO poses a danger of abuse where a prosecutor attempts to apply the statute to situations for which it was not primarily intended." Also, in U.S. v. Anderson, 626 F.2d 1358 (8th Cir. 1980) at 1371, the court said, "the government's view of the RICO prosecutions... leads to the conclusion that almost any two criminal acts affecting interstate commerce would fall within the ambit of RICO. Certainly Congress did not silently intend such a drastic reshuffle of the federal-state balance as the expansive theory of the government would entail."

THROUGH A PATTERN OF RACKETEERING ACTIVITY: SECTION 1962(b) and SECTION 1962(c)

Earlier discussion noted that the interpretations courts attach to RICO Section 1961 (definition of terms) have important implications. Whether a court interprets, broadly or narrowly, such terms as person, enterprise, or pattern (as found in the definitions in Section 1961) determines what types of activity and what individuals come within the scope of the statute. Sections 1962(b) and 1962(c) present problems of interpretation which are not alluded to in the Section 1961 definitions. The problem lies in determining how broadly or narrowly to interpret the term "through" in the phrase, "conducting or participating in the affairs of an enterprise through a pattern of racketeering activity." The Stofsky case, outlined below, and the diagram on the following page, illustrate the nature of the "through" problem.

In U.S. v. Stofsky, 409 F. Supp. 609 (S.D.N.Y. 1973), the defendant argued that Section 1962(c) is unconstitutional because it is vague--it fails to set out the degree and intensity of the connection required between racketeering activity and the usual operation of the enterprise; therefore, the individual cannot predict, with any certainty, what conduct on his part might be unlawful.

The court held that Section 1962(c) is not vague--it is broadly worded and does not list the specific relationship required between the racketeering activity and the enterprise because it is meant to cover the several different ways criminal activity may influence or use an enterprise. Therefore, "through" is meant to include the several different ways criminal activity may influence or use an enterprise.

Originally, U.S. courts had some differences as to what the "through requirement" included. The courts were using two tests as shown below.

The "Through" Requirement

1. Broad Test: requires only a nominal relationship between the criminal acts and the enterprise--e.g., U.S. v. Scotto--union leaders accepting bribes and illegal payments from companies.

   Held: "through" requirement is met when a) someone acts solely by virtue of his position in the enterprise, or involvement in, or control over the affairs of the enterprise, or; b) the criminal offences are related to the affairs of the enterprise (i.e., with this test it is not necessary that the racketeering activity enhance or advance the enterprise).

Problem with the Broad Test: it may result in a situation where a completely legitimate business is subjected to RICO penalties because the owner of a business commits two criminal acts only marginally related to the business; i.e., RICO punishes individuals it was not intended to cover.

2. Strict Test: requires that there be proof that the racketeering activity actually advances the affairs of the enterprise; e.g., U.S. v. Webster (original Court of Appeals decision) held that evidence indicated that the defendant used facilities of the enterprise for drug-dealing, but there was no evidence indicating that the drug-dealing advanced the affairs of the enterprise. Therefore no Section 1962(c) conviction.

Problem with the Strict Test: some corrupt enterprises will be immune to RICO penalties because the prosecution cannot always show that the enterprise is funded by or advanced by the racketeering activities.

In spite of the early division of views, the courts now generally favour the "Broad Test". This is illustrated by the decision given in Webster when it was re-heard en banc [669 F.2d 185 (1982)]. The 4th Circuit Court of Appeals in rehearing the decision held that the passive use of a business or office in the alleged drug-dealing activities came within s. 1962(c) if the business or office was "an instrument" in a pattern of racketeering activity. In other words the prosecution need not prove that the enterprise was advanced or profited from the pattern of racketeering activity.

It is important to note however that the problem of the "through requirement" only occurs when the enterprise in question is a legal one. Where the enterprise is an illegal one (e.g., a drug-dealing operation) there is no need for the "through requirement;" the court, in theory, will presume that each racketeering act of drug-dealing furthers the drug-dealing enterprise. See U.S. v. Turkette, 101 S. Ct. 2524 (1981).

IV. CRIMINAL FORFEITURE AND CIVIL REMEDIES

The RICO statute provides for both criminal forfeiture and civil penalties which are modelled after the anti-trust laws and therefore include divestiture, injunctions and dissolution of the enterprise, in addition to a private right of action for treble damages to persons injured by reason of the RICO violation.

CRIMINAL FORFEITURE

Under Section 1963(a), the penalties for a RICO conviction for any violation of Section 1962 include fines of up to $25,000 per count, prison sentences of up to twenty years, and forfeiture of any interest acquired or maintained in violation of the statute. Criminal forfeiture is an innovative RICO provision to provide a means of separating the convicted racketeer from the infiltrated enterprise. As Taylor states, forfeiture was intended to "restore victimized commerce to health, not to bankrupt defendants or dismantle their businesses."[21] The government's right to seize forfeited property is contingent upon the nature of the property, not the owner's crime.

The U.S. Department of Justice encourages prosecutors to invoke forfeiture wherever substantial forfeitable property exists and there is a reasonable chance of success. Forfeitures have been obtained in a wide range of cases, and many sorts of interest have been forfeited, e.g., elected offices in labour unions, profits from contracts obtained by fraud, cash, jewelry, real estate, restaurants, office buildings, airplanes, automobiles, supermarkets, and massage parlors. Forfeitures involving offical state elected positions and property transferred to third parties have proven controversial.[22]

SCOPE OF THE FORFEITURE PROVISION

1. Forfeiture of Interests in Legitimate Businesses

Section 1961(4) refers to "enterprises," including corporations and partnerships involved in legitimate businesses, which, if found in violation of Section 1962, are subject to forfeiture under Section 1963(a). A legitimate business will conduct a certain volume of lawful commercial business. Consequently, prosecutorial discretion may lead the government to seek forfeiture only of a portion of the enterprise. Only the defendant's interest in the enterprise is subject to seizure, but if other partners or stockholders are merely nominees of the defendant, the defendant's forfeitable interest may exceed his percentage of legal ownership. On occasion, the prosecution may forego forfeiture of those components of the business conducting legitimate activity. However, the racketeering activity to which the RICO statute is applied will justify forfeiture of the defendant's entire interest, even if it encompasses the whole enterprise.

Nevertheless, in cases under Section 1962(c), prosecutors may not seek forfeiture of an entity owned by a defendant if the affairs of the entity were not conducted through a pattern of racketeering activity.

2. Forfeiture of Profits and Proceeds

Originally, American courts rejected prosecution arguments that profits or proceeds from a pattern of racketeering (Section 1962(c)) are forfeitable. The courts held that profits obtained from a pattern of racketeering activity are not forfeitable unless they are invested in violation of s. 1962(c).

The early position of the courts on the "profits" issue is outlined by the *Marubeni*, and *Thevis* cases.

In U.S. v. Marubeni America Corp., 611 F.2d 763 (9th Cir. 1980), two corporations bribed someone in order to obtain contracts. The indictment asked that all money received from the contract, including profits, be forfeited. The trial judge dismissed this count. On appeal, the court decided that only the interest acquired and maintained in an enterprise was liable to forfeiture, on the grounds that if the Congress had wanted income from the interest to be forfeitable, it would have so stated.

In U.S. v. Thevis, 474 F. Supp. 134 (S.D.Ga. 1979), two corporations and an individual operated a pornography business. The court held that the interest to be forfeited did not include the profits from the enterprise, but did include all goods and services provided by the partners to be used in the enterprise.

Recently, however two Courts of Appeals have decided that profits derived from racketeering activity are subject to forfeiture. In U.S. v. Godoy, 678 F.2d 84 (1982), the 9th Circuit Court of Appeals decided that commercial real estate purchased with profits derived from racketeering activity is subject to forfeiture. The court reasoned that ownership of commercial real estate constituted "interest in any enterprise" under s. 1962(a), and Section 1963(a).

The 5th Circuit Court of Appeals (en banc) in U.S. v. Martino, 648 F.2d 367 (1981), disagreed totally with the reasoning in Marubeni and held that cash insurance proceeds obtained through a pattern of racketeering (repeated arsons) were subject to forfeiture under RICO Section 1963(a)(1) even though the proceeds had not been invested in an enterprise. In reaching this opinion the Court of Appeal carefully analysed and criticized the reasoning in Marubeni. After reviewing the legislative history of the RICO statute, the court concluded that as a matter of statutory construction "Section 1963(a)(1) does not limit forfeitable interests to those in an enterprise. Rather, the statute speaks broadly of any interest which is the product of violating RICO's prohibitory provision [Section 1962]" [at 954].

The impact of Martino cannot be over estimated. The case has gone to the U.S. Supreme Court and will be decided upon some time in late 1983. Should the Supreme Court agree with the 8th Circuits decision, Marubeni will have been overruled and the profits of RICO racketeering activities will be forfeitable whether or not they have been invested in an enterprise.

Even if the Supreme Court disagrees with the 5th Circuit's construction of Section 1963(a)(1), forfeiture of profits may be achieved by legislative amendments. Bill S 2320 and Bill SH 6150 amending RICO in general and Section 1963 in particular are now before the U.S. House. A discussion of the amendments is found on page 28.

In the case of U.S. v. Huber, 603 F.2d 387 (2d Cir. 1979), the defendant, who owned several corporations through which he defrauded some hospitals, was ordered to forfeit all of his corporations unless he paid $100,000 to the U.S. Attorney General. On appeal, the court held that all the corporations were forfeitable because all had been conducted through a pattern of racketeering activity. However, the court should attempt to separate the "tainted" from the untainted property.

In addition to the extensiveness of forfeiture, there is the issue of whether or not the judge has the power to use his own discretion in ordering forfeiture. In the case of U.S. v. L'Hoste, 609 F.2d 796 (5th Cir. 1980), the defendant was found guilty of bribing municipal officials in order to obtain building contracts, but the trial judge declined to order forfeiture of the construction company because the interest of the defendant's wife would be adversely affected. On appeal, however, the court held that forfeiture was mandatory when the conditions of Section 1963(a) were met. The defendant's entire interest was forfeitable, and this included all of the company. The defendant's wife had recourse to the U.S. Attorney General, who must, under Section 1963(c) take the rights of innocent parties into account when disposing of forfeited property.

3. Forfeiture of Property Transferred to Third Parties

This section addresses two questions. First, can a conviction result in the forfeiture of an interest owned by parties not charged with the crime, and second, if prior to indictment, a defendant assigns or transfers a potential forfeitable interest to a person not involved with the enterprise, can the government seize the interest held by the third party?

It has been argued that for criminal forfeiture to be effective the courts must interpret the statute so as to allow the prosecution to follow assets into the hands of third parties. Otherwise, defendants could avoid forfeiture by transferring ownership to relatives or associates prior to indictment. The ultimate effectiveness of the forfeiture provision depends upon the development and acceptance of a legal interpretation that will allow the government to seize criminal assets that have been transferred to third parties.

However, in U.S. v. Thevis (1979), the court dismissed the government claim and held that the interest of uncharged heirs, successors, and assigns could not be forfeited because mandatory forfeiture can occur only upon conviction, and unindicted parties cannot be penalized. This decision was based on the argument that if elimination of criminal infiltration into legitimate enterprises is the purpose of RICO, then the government should not be concerned with the disposal of these interests as long as they truly are divested.

Conversely, the courts in two cases have accepted the forfeiture of the interests of a third party. In one case, the courts accepted the government claim that tainted property transferred to third parties prior to or after indictment was subject to forfeiture without any showing that the property had been transferred to avoid such forfeitures. In the other case, the government claim was accepted although the defendant's wife was not charged with a criminal offence. Her interest was subject to forfeiture because it was an interest in tainted property controlled by her husband.[23]

4. Obtaining a Criminal Forfeiture

To obtain a criminal forfeiture, a preliminary financial investigation is required to determine which interests would be subject to forfeiture. An intensive financial investigation may not result in a significant forfeiture. However, it will provide intelligence on the suspected criminal organization that could aid in further investigation; may identify managers or financial brokers by tracing illegal profits; provide financial information in developing the case for prosecution; and assist in setting bail in determining the length of sentence.

The prosecution must give notice in the indictment that forfeiture is being sought. At the time of indictment, the prosecution can also seek a restraining order which prevents the dissipation of assets allegedly subject to forfeiture. Pre-trial restraining orders under RICO have been problematic. Attempts have been made to resolve the problems by providing guidance as to the minimal requirements of a restraining order in criminal cases, i.e., the prosecution must demonstrate that they are likely to convince a jury beyond a reasonable doubt that the defendants were guilty of the crime charged; that transfer or disposition of the property would constitute irreparable harm;

that the public interest would be served by a restraining order; and that failure to enter the order would defeat the objective of removing legitimate business interests from criminal ownership.[24]

To decide the forfeiture issue, the usual practice is to require the jury first to decide the verdict of guilt and then to instruct the court on the amount to be forfeited. After closing arguments by the prosecution and defense, and instruction on forfeiture by the judge, the jurors decide the extent (if any) of the interest or property subject to forfeiture. Once the jury determines what interests are subject to forfeiture, the court must (according to U.S. v. L'Hoste (1980), issue an order forfeiting the property. Disposition of the property or interest to be forfeited comes under the jurisdiction of the U.S. Attorney General, as stated in Section 1963(c).

5. Disposing of the Forfeited Property

The forfeiture is completed by disposing of the property. The disposition of the defendant's property presents a number of technical, legal and practical issues outside the realm of more conventional criminal procedure.[25] The RICO statute does not provide procedures for obtaining control of the property, managing and maintaining it, settling the rights of third parties or selling the property. The Congress simply provided that forfeitures under the RICO statute would follow the customs law procedures as applicable and not inconsistent with the provision of the RICO statute, Section 1963(c). The final stage in this process entails the disposition of forfeited property. The U.S. Department of Justice recommends that disposal procedures should be formulated case-by-case, using the customs law procedures as guidelines but adapting them as necessary.

Obtaining physical and legal control of a corporation or numerous different shell corporations, when the defendant is unwilling to co-operate, is a difficult matter. The corporation must be managed, pending sale. The claims of third parties who may assert that they have legal interests in the property of the forfeited corporation must be investigated and resolved. In one case, U.S. v. Huber (1979), all of these concerns were present. Because the Huber case is a paradigm of the issues that can face a prosecutor in the final stage of forfeiture proceedings, the U.S. Department of Justice has reprinted a number of documents filed in that case (see Appendix B).

6. Safeguarding the Forfeited Property

Disposition of forfeited property should await affirmation of the judgment by a Court of Appeals or from the Supreme Court. However, once a final decision has been reached, it is important that the government take over the property as soon as possible in order to terminate the process. If a restraining order has not been obtained, it should be sought immediately following the judgment.

7. The Tracing Problem

Property subject to forfeiture must be identified. The U.S. Department of Justice suggests that the tracing rules used to give effect to constructive trusts and equitable liens be employed to resolve identification problems. A criminal forfeiture should place the government in a position analogous to that of a claimant attempting to identify property by a constructive trust or an equitable lien.[26]

8. The Right of Third Parties

In a forfeiture proceeding, all parties who claim an interest in the property have an opportunity to present their claims in court, after the jury has rendered the special verdict, and before the property has been declared forfeited to the government. There are two categories of third-party claims that would be legally recognized in the courts:

1) the property was not properly subject to forfeiture at all;
2) the claimant's interest in the property should be given legal priority over that of the government.

The facts of the Mandel case (602 F.2d 653 (4th Cir. 1979) provide the material from which a hypothetical claim of the first type can be constructed. In Mandel, the government alleged that one of the defendants was a secret owner of racetrack shares that were subject to forfeiture under RICO. The shares were held in the name of a third person who was not charged in the indictment. The government alleged that the third person was merely a nominee for the defendant. If it were assumed, for the sake of argument, that the government was wrong and that the third person really owned the shares, the defendant would have little interest in litigating the issue of ownership, since under the assumed facts he was not the real owner. The third person obviously should have a right to be heard before being deprived of the shares. Due process would not be satisfied merely by affording the third party the opportunity to petition the government for remission of the forfeiture, since the granting of such a petition is a matter of executive grace and depends upon a showing that the third party is morally blameless.

A claim of the second type would be made by lienholders and other creditors; for example, a bank which held a mortgage on forfeited property.[27]

9. The Sale or Other Disposition of Forfeited Property

Property subject to forfeiture may be sold, retained for government use, destroyed or donated. Innocent third parties, such as creditors, may be able to help the government negotiate a sale of the property, or purchase the property themselves.

10. Cash in Lieu of Forfeited Property

In several cases, prosecutors have entered into agreements whereby the defendant was permitted to substitute cash for a specific property interest that had been found forfeitable. This may solve some practical problems. However, if the forfeited property is an ongoing business, allowing the defendant to retain control of the business clearly thwarts the purpose of the Congress to remove racketeers from their sources of funds. Moreover, defendants will be in the best position to know the actual value of the business and the government may strike an unfavorable bargain.[28]

On the other hand, there may be circumstances where accepting cash in lieu of a forfeiture would clearly be appropriate. For example, a defendant about to go to prison on a RICO conviction knows that his home has been declared forfeitable because it was used as a storehouse for illegal narcotics. The home has been appraised at $500,000. The defendant offers to pay a fine of $500,000 in substitution for the house so that his wife and children do not have to move to another home. There may be merit in accepting the defendant's offer.

11. Other Considerations

The possibility of massive and disproportionate forfeitures under RICO raises problems with respect to the Fifth and Eighth Amendments to the U.S. Constitution. A forfeiture might have no relationship to the stated purpose of the RICO statute and could be so out of proportion to the crime that it would be deemed cruel and unusual punishment. For example, a person might devote years to developing a successful retail business. Later, perhaps, the person becomes greedy and commits two mail fraud violations and therefore perpetrates a pattern of racketeering to obtain specific contracts. Although the additional revenues from the contracts derived by the mail fraud may be small in proportion to total revenues, nothing in Section 1963 prohibits forfeiture of the person's entire business.

Finally, the role of the trial judge in deciding the extent of the forfeiture has raised procedural issues. Trial courts have a mandate to avoid cruel application of the forfeiture provision. However, it has been determined that trial courts have no discretion to grant remission or mitigation of forfeiture.[29] Strong mitigating circumstances could result in the mandatory forfeiture being deemed unusually cruel.

PROPOSED AMENDMENTS TO RICO FORFEITURE PROVISIONS

Bills S 2320 and SH 6150[30] are currently being reintroduced to the United States House of Representatives. These Bills are intended to amend several aspects of the forfeiture provisions contained in the current RICO legislation.

Section 101 of the Bill contains provisions to obtain the forfeiture of profits derived from a pattern of racketeering activity. It adds the following subsection to Section 1963:

1) Whoever violates any provision of Section 1962 of this chapter...

2) Shall forfeit to the United States any property, irrespective of State law...

3) Constituting, or derived from, any proceeds which he obtained, directly or indirectly from racketeering activity or unlawful debt collection in violation of Section 1962 of this chapter.

In the Senate Judiciary Committee Report of July 12, 1982, the intent of Section 1963(a)(2)(B) was described as follows:

> to come within the scope of this provision, the property must constitute, or be derived from, proceeds the defendant obtained through the racketeering activity or unlawful debt collection involved in the RICO violation.[31]

Section 1963(c) is changed so as to codify the "taint" theory that the property is tainted and remains subject to forfeiture regardless of any subsequent transfer. Without such a principle, defendants can avoid forfeiture by transferring property to other persons prior to conviction.

In addition, the amendments contain a new section--Section 1963(d)--which authorizes the court to order the defendant to forfeit substitute assests when the property originally subject to forfeiture is no longer available at the time of conviction. This subsection authorizes forfeiture of substitute assets in five situations where property found subject to forfeiture under Section 1963(a)(2) [as amended by the Bill]:

(1) cannot be located;
(2) has been transferred to or deposited with a third party;
(3) has been placed beyond the jurisdiction of the court;
(4) has been substantially diminished in value by the defendant;
(5) has been comingled with other property which cannot be divided without difficulty.[32]

Bills S 2320 and SH 6150 contain provisions allowing the courts to grant a restraining order preserving forfeitable property before a defendant has been formally charged. Section 1963(e) and Section 1963(f) are amended to provide more flexible provisions for dealing with forfeited property between the order of forfeiture and the time that the Attorney General directs disposition of the property.

The intent of the U.S. Department of Justice is to overcome the defects of the current forfeiture provisions. Whether or not the attempt will succeed is debatable. The American Bar Association has already protested against the new forfeiture provisions on the grounds that the changes will be prejudicial to third party rights in property subjected to the forfeiture process. However, should the amendments as proposed become law, the forfeiture provisions of RICO would be much more powerful than under the previous legislation as interpreted by the courts.

CRITICISMS OF THE AMENDMENTS

Steven Horn, of the American Bar Association, mentioned three problems that concern some critics of the proposed amendment:

1) Debate over who is an innocent third party:

   Under the draft amendment, an innocent person is not necessarily a person not found guilty, but rather a person who establishes to the Attorney General by evidence contained in a petition that

   (a) he was a bona fide purchaser of the property for value; and

(b) he was reasonably without cause to believe that the property was of the type described in subsection(a).

Therefore, the innocence of defendants must be proven before they are protected against forfeiture of their property.

2) Notion of "tainted" people and "tainted" property:

The amendment contains no specification as to how tainted or how recently tainted the property or proceeds must be before dictating forfeiture. The lack of standards may have been intentional in order to broaden the range of the provisions. However, it is believed by critics that the range could become too broad and too discretionary.

3) Question of payment of defence lawyers:

There is fear that the amendment will be increasingly interpreted to the effect that assets cannot be used to pay the defendant's lawyer. Section 1963(f) states:

> "No property forfeited pursuant to this section may be ordered applied to offset any claims against, or obligations or expenses of, the defendant".

There is more of a problem with this amendment than under the original bill, because the assets being frozen or forfeited have been expanded to include all proceeds. Legal aid lawyers may not have the time, resources or expertise to fight a RICO prosecution.

CIVIL REMEDIES IN ORGANIZED CRIME CONTROL

The RICO statute allows for the wide use of civil remedies. These remedies were intended to compensate for the harm done by organized crime activities. Section 1964 authorizes the U.S. Attorney General to institute civil proceedings to divest a person of any interest in an enterprise, restrain future activities or investments, and dissolve or re-organize any enterprise, subject to the rights of innocent persons. Section 1964(c) allows any person who is injured in his business or property by reason of a violation of Section 1962, to sue for treble damages, in addition to costs and reasonable attorney's fees. A number of private actions are pending under this provision.[33]

An interesting case was eventually settled out of court in New Jersey, where a compulsive gambler brought a civil suit under RICO, (with its treble damages clause) against Resorts International, claiming that this legitimate enterprise had been involved in a pattern of racketeering which resulted in his becoming over one million dollars in debt. The treble damage clause would have resulted, if successful, in a three million dollar settlement from Resorts International and the cancellation of the one million dollar "illegal" debt. Prior to settlement, this case was granted RICO status. Had it been successful, an independent citizen would have challenged an organized enterprise and successfully won damages. Such cases are infrequent but not unique. Civil remedies have been successfully obtained in several cases (U.S. v. Cappetto,[34] U.S. v. Price).[35]

In a speech to the National Association of Attorneys-General, Robert Blakey outlined some of the advantages of the civil approach by comparing it with the criminal law[36]. The civil proceeding begins with an amendable complaint, unlike a criminal proceeding which begins with an indictment based on probable cause and which cannot be amended. The criminal case may have to be tried before a jury with all of the evidentiary protections, whereas the civil case would be tried before a judge who might be more responsive to the legal arguments involved in complex RICO proceedings. Discovery is broader and the standard of proof in a civil suit is the "preponderance of the evidence" rather than "beyond a reasonable doubt".

A study of the use of civil remedies by the National Association of Attorneys General lists five additional advantages of the civil approach:

1) The scope of remedies available is generally much wider under the civil than the criminal law. Punitive sanctions under the criminal law are limited to fines and imprisonment. The civil law offers such wide-ranging approaches as restitution, prohibition of future activity, and monetary penalties.

2) The injunctions that are available under civil law make immediate relief available. It is possible through an injunction to prevent illegal activities and to control future conduct. Often an injunction can more quickly and effectively terminate the economic existence of an illegal enterprise than can criminal prosecution. Criminal convictions of all participants may not be obtainable, and, if they are, the resulting sentences may be inadequate. Courts are notoriously reluctant to impose stringent criminal penalties on white collar criminals. A mobster may appear to be a "respectable" citizen, and a jury or judge may find it difficult to send him to prison. There is less reluctance however, to impose economic sanctions on such a person or to enjoin undesirable behaviour. If the injunction is violated, the defendant may be sent to jail.

3) The cost of a criminal trial, in time and money, may make prosecution impracticable. A civil action may be both faster and less costly. Administrative proceedings, which offer another approach to invoking civil remedies, usually involve considerably less cost than a court trial.

4) The state may gain an advantage because defence attorneys are seldom familiar with civil law, although they may be skilled and sophisticated criminal defense lawyers.

5) The state Attorney General, has a staff experienced in civil litigation. This would be of great value in successfully invoking civil remedies against organized crime.[37]

One of the main areas of controversy over the civil damage suit with treble compensation involves the interpretation of Section 1964(c). A broad interpretation would result in suits brought due to damages sustained by individual acts of criminal activity, whereas a narrower interpretation requires the individual to have been injured competitively by the unfair competition of an illegally funded enterprise, i.e., by the RICO violation rather than the predicate acts. As Kiffel states:

> In effect, the broad construction replaces the rule that treble damages can be recovered only when they occur by reason of a violation of Section 1962 - with a rule permitting recovery of treble damages whenever there has been a violation of Section 1962.[38]

Section 1964(a) grants district courts of the United States the jurisdiction to hear civil actions and grant equitable remedies to prevent and restrain violations of Section 1962. Section 1964(b) provides that the government as plaintiff may initiate RICO civil actions. The combined effect of these two sections is to allow the government to bring a civil action as plaintiff, against an alleged RICO violator as defendant, requesting the court to grant one or more of the remedies listed in 1964(a)--divestiture of information, prohibition or injunction orders with respect to certain activities, disclosure orders, etc. One of the most significant cases is summarized below.

In U.S. v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied 420 U.S. 925 (1975), the Court of Appeals found the provisions of Section 1964 to be constitutional. At trial, the government proceeded under the civil remedy provisions of Section 1964. The government alleged that the defendants had violated RICO sections 1962(b), (c), (d). The defendants relied upon the Fifth Amendment and refused either to comply with the judge's discovery orders, to be sworn or to appear for depositions. The trial judge in response entered three orders: first, the court entered a default judgment against the defendants; second, the court granted an injunction restraining the defendants from engaging in further gambling activities; third, the court held the defendants in contempt of court for refusing to obey discovery orders.

The defendants, on appeal, argued among other things that:

1) The action under RICO Section 1964 is essentially a criminal proceeding. Therefore they were entitled to the rights guaranteed by the Constitution to defendants in criminal cases, and should not be subject to the less stringent burden of proof procedures of a civil action;

2) Section 1964 is vague and therefore unconstitutional.

In response to the defendants' arguments, the Court of Appeals held as follows:

1a) It is settled law in the U.S. that Congress may prohibit activities made unlawful by state laws which affect interstate commerce (at 1356). It is also settled law that "acts which may be prohibited by Congress may be made the subject of both criminal and civil proceedings, and the prosecuting arm of the government may be authorized to elect whether to bring a civil or criminal statute, or both. A civil proceeding to enjoin those acts is not rendered criminal in character by the fact that the acts separately are punishable as crimes." (at 1357).

b) Section 1964 provides for a civil action in which only equitable relief can be granted, i.e., the relief provided by the section is remedial, and is of a type traditionally granted by courts of equity. It is not punitive (criminal) relief (at 1357). Therefore, RICO Section 1964 is not unconstitutional by reason that it is essentially a criminal law provision. In substance and process, Section 1964 is a provision for civil action.

2) Section 1964 is not unconstitutional due to vagueness. It is a specific grant of jurisdiction to enforce the substantive provisions of the statute by means of equitable remedies. The kinds of activities to which the equitable relief may be addressed are described with sufficient specificity in the substantive provisions in question (Section 1955 and Section 1962). The conditions under which an injunction (equitable relief) will be issued depends on the settled principle of the law of equity. These principles of equity are not vague (at 1357 and 1358).

V. AMERICAN EVALUATIONS OF THE STATUTE

The main conclusions outlined in the major American evaluations of RICO are noted below. The alleged shortcomings are described first, followed by the alleged strengths. There are five potentially negative factors and three potentially positive ones.

RICO: THE WEAK POINTS

These factors are discussed in a sequence approximating the movement of a case through the various stages leading to a RICO prosecution: first the question of the purpose behind RICO, i.e., at whom should it be aimed; second, the constitutional questions; third, the difficulties of successfully prosecuting and attaining forfeiture under RICO, given the discretionary nature of the statute; and fourth, the "clarification" of the statute by the courts rather than by the U.S. Congress.

1. Ambiguous Aims of RICO

The "Statement of Findings and Purposes" of the Organized Crime Control Act, 84 Stat. 923, asserted that the objective of RICO and the Organized Crime Control Act was to seek the eradication of organized crime in the United States. An attempt was made to include all crimes which are commonly engaged in by members of "organized crime". However, the RICO statute has increasingly been applied to other than organized criminal activity. Once it was shown that racketeering did not have to be "organized" and "enterprises" did not have to be legal ones, the focus of the stated aim was broadened. Increasingly, white collar, corporate and governmental crimes have been prosecuted.

As Schmidt states:

> The scope of the statute must be narrowed either by the judiciary or Congress, and its language refined to focus on the evil it was designed to eradicate--the financial infiltration and corrupt operation of legitimate business operations. With such a corrected focus, RICO would be a powerful tool equal to the difficult task of combatting the sophisticated elements of organized crime. Without such remedial revisions, RICO will continue to develop into a standardless criminal catch-all.[39]

2. Constitutional and Procedural Questions

The RICO statute has been challenged on the grounds that it violates constitutional prohibitions against *ex post facto* laws and double jeopardy, cruel and unusual punishment and statute limitations. Although none of the constitutional challenges has been maintained, they are worthy of discussion because of the seriousness of the issues raised.

A. Violation of the Constitutional Prohibition Against Ex Post Facto Laws

It is true that RICO could cover acts committed prior to the effective date of the statute, but the courts have decided that the statute avoids unconstitutionality by the definition of "pattern of racketeering activity," which requires "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after commission of a prior act of racketeering.[40]

B. Double Jeopardy

Given that the RICO statute incorporates federal and state penal laws, anyone who has been convicted of a RICO offence also will have committed the predicate offences on which the RICO charge was based. For example, if the predicate offences of RICO charge include two acts of labour racketeering and the defendant is found guilty, then the defendant has committed a RICO offence, and also is guilty of two acts of labour racketeering. It is common practice for the prosecutors to indict persons for both the RICO offences and the predicate offences, using separate charges for each. This approach by the prosecutors raises the issue of whether such a conviction violates the constitutional rule against double jeopardy (no person shall be subject for the same offence to be twice put in jeopardy of life or limb) or the rules against multiplicity (charging for a single offence in several courts).

Courts have held that it is permissible to charge a defendant with both RICO offences and the predicate offences. The most common rationale for charging the defendant with both offences simultaneously is that even though both charges arise out of the same conduct, the RICO offence has the added element of a pattern--the government must prove at least two separate instances of racketeering activity. Since the elements of each offence are not exactly the same, the courts have been satisfied that double jeopardy and multiplicity were not present.

C. Cruel and Unusual Punishments

Concern has been expressed that the broadness of the RICO statute will allow or encourage the prosecution of relatively insignificant violations. If this occurs, the punishments meted out could exceed what the individual offences would merit under state or federal criminal law. It might therefore be argued that the RICO penalties, including forfeiture and anti-trust-type civil remedies, might not always be justified. Once it is decided to prosecute under RICO, the statute makes no distinction between serious and minor offenders.[41]

Related to the constitutional question of cruel and unusual punishments is the question of extra-ordinary investigatory powers under RICO, and the feature which allows the state to seek civil, as opposed to criminal, remedies. Civil remedies require only a degree of proof, rather than the criminal "beyond a reasonable doubt" standard of evidence.

Wiretapping, the use of informants and "sting" operations are all available to aid the RICO evidence gathering process. Blakey and Gettings refer to Section 1965(b) of RICO as being one of the most potentialy far-reaching procedural devices, in that it authorizes the court, if the interests of justice require, to cause "other parties residing in any other district to be brought before the court." Section 1965(c) specifies that witnesses can be subpoenaed in any judicial district, for private civil suits as well as governmental suits.[42]

These powers may be "positive" if the focus is on the violent, exploitive, organized criminal. However, if the defendant is of lesser criminal significance it may be extreme. As Tarlow states:

> The present overbroad application of Title IX with its accompanying severe penalties has resulted from an abrogation of responsibility at all stages of the criminal justice system. Congress has promulgated a vague statute that gives no clear warning of the proscribed activities. The courts have broadly interpreted it in derogation of their obligation to narrowly construe criminal statutes. The actions of the prosecuting authorities have belied their public pronouncements that they would not 'power rape nickel and dime cases'. This situation can only be remedied by legislative action to clarify and revise the statute and by increased sensitivity of the courts directed toward protecting defendants from unfair and unconstitutional application of Title IX.[43]

D. Statute of Limitations

This issue is one with which the American Bar Association is particularly concerned. As the RICO statute now reads, a "pattern" can extend backward in time without limitation as long as each consecutive act is no longer than 10 years apart from another, and the most recent act occurred within the five-year statute of limitations period. Therefore, offences may be prosecuted under RICO which could not separately be prosecuted at the state or federal level because of the statute of limitations.

The American Bar Association emphasizes that the absence of any limitation on how far back in time RICO can reach raises the same policy considerations that lay behind the statute of limitations concept. As the A.B.A. report to the House Delegates in 1982 states:

> The Supreme Court has focused on two major policies served by the limitations concept: (1) protecting an individual against charges which occurred so long ago that the defendant cannot complete evidence and cannot accurately reconstruct the events due to the fading memories of witnesses; and (2) encouraging law enforcement officials to promptly investigate suspected criminal activity.[44]

The American Bar Association recommends that all offences prosecuted under RICO should have occurred within five years of the date of indictment, in order to prevent "the prejudice and unfairness inherent in defending 'old' charges."[45]

E. Vagueness

Some critics argue that the wide interpretation of the elements of RICO make it impossible for the prospective defendants to know clearly what is illegal under the statute. The interpretations given to "enterprise" and "pattern of racketeering" are varied and therefore lack uniformity.

By the precepts of constitutional law, criminal statutes are required to have definite language which would allow an individual to predict with certainty what conduct on his part would be unlawful. Where doubt exists, lenity is to be applied to the defendant. As stated by Gardner and Manian:

> a basic principle of English and American law is that no one can be lawfully punished for his conduct (or omission) unless that conduct has been clearly made a crime by statutory or common law of that jurisdiction ...The criminal statute must be specifically directed at a defined evil (or wrong) and written clearly enough to put the person on notice as to what acts are forbidden or are required.[46]

The "void-for-vagueness" test asks whether a statute or ordinance on its face is "so vague that men of common intelligence must guess at its meaning and differ as to its application."[47] In addition, a statute or ordinance is deemed unconstitutional if its language is so broad that its sanctions may apply to conduct which is protected by the Constitution. The broadness of the court interpretations, and the diverging court decisions, make RICO susceptible to both of these criticisms.

3. Overly Discretionary: Imaginative Use of a Statute to be Liberally Construed

> "our system of ordered liberty cannot support a broad and 'imaginative' reading of criminal statutes in the hope of increasing their *in terrorem* effect."[48]

Much of the controversy over RICO has to do with the clause which explicitly states that "this title shall be liberally construed".[49] Since Title IX encompasses both civil and criminal provisions, it is argued by some courts that the "liberal construction" clause refers to both forms of penalties. The argument is focused on the control of organized crime, and emphasizes that traditional law enforcement efforts are not adequate to prevent widespread and diversifed illicit activities. The U.S. Congress responded by creating a broad statute that would have the flexibility denied by the doctrine of strict construction. Because RICO is considered remedial rather than penal, the emphasis is on using a liberal construction to "suppress the evil and advance the remedy."[50] However, DaCosta[51] (among others) argues that whereas the U.S. Congress wanted a potent weapon against the infiltration of racketeering, the courts should not see "liberal construction" as being the focus in interpreting RICO, but rather that the focus should be on the remedial purposes of the statute.

The "broadness" of RICO increases when its various conditons are redefined or eliminated in the course of defining liberally the key elements and imaginatively applying the sanctions. Bradley argues that the national fear of organized crime in the U.S. has read out some of the key elements of RICO, and that many circuit courts have widened the grounds for RICO prosecution by failing to require an enterprise with a discernable structure, existing apart from the racketeering activity.[52] This broad base for allowable RICO prosecution was acknowledged by a Department of Justice official, who said:

> It's just common sense...and good judgment...We will only hit substantial conduct.[53]

Some critics are not content with this assurance. The application of RICO to minor as well as major criminal involvements is restricted solely by prosecutorial discretion and review by the courts. Certain critics think that this is too susceptible to prosecutorial, judicial and political whim. As Schmidt states:

> To date, the potentially broad reach of RICO allowed by this lack of specific legal definitions has been tempered only by prosecutorial discretion. The delegation to prosecutors of such fundamental matters, however, for resolution on an ad hoc basis, with the attendant dangers of arbitrary and discriminatory application, is constitutionally unacceptable. To allow a prosecutor or court to define and to apply on a case-by-case basis such vague but nevertheless crucial concepts clearly offends the due process considerations underlying the constitutional principle that any federal or state criminal statute must give fair warning of the conduct it proscribes.[54]

The American Bar Association recommends that the liberal construction clause be repealed, on the basis that it is an "erroneous method of statutory interpretation as well as a violation of due process."[55]

4. Difficulties Involved in Prosecuting Under RICO and Obtaining Forfeiture

Under the previous sections dealing with constitutional questions and the overly discretionary nature of RICO, it was suggested that minor criminals with no organized crime connections can get entrapped in the RICO net via the liberal interpretations, by the use of mail fraud as the predicate offences, or by taking a very loose interpretation of the enterprise clause. At the same time that critics fear the power available to prosecutors under RICO, the difficulties involved in obtaining key RICO prosecutions is seen to be a failing--at least to date. It may appear contradictory that the RICO prosecution is "difficult" from both sides--defendant and prosecutor (or plaintiff in civil suits). However, part of the criticism of RICO is due to the difficulties posed to both parties.

A. Lack of Prosecutorial Familiarity with RICO

Provision for criminal forfeiture, which had been prohibited from 1790 until 1970, was re-introduced in the Organized Crime Control Act. This law was introduced without an adequate educational program to familiarize the prosecutors and courts with this area of law. As Keven Rooney, Assistant Attorney General for Administration in the U.S. Department of Justice, states:

> The lack of basic in-depth training, and Departmental policy to develop these cases, combined with the lack of requisite resources, contributed to prosecutors refusing to seek criminal indictments under RICO or CCE, much less criminal forfeitures within these indictments.[56]

RICO became effective in 1970 but very few RICO prosecutions were made until 1980. In order to encourage use of the statute, John Dowd, Attorney in charge of the U.S. Department of Justice "Strike Force Eighteen," spent twenty months, beginning in 1975, travelling around the United States to inform attorneys and their assistants on the use of RICO.

B. Layering of Proof

RICO crime involves various layers of proof; i.e., proof that the defendant committed two predicate acts; that those acts were part of a pattern; and that they had a particular impact upon the enterprise. Criminal forfeiture requires that the state is able to trace the funds from the pattern of racketeering to an enterprise where they have been used to acquire, maintain an interest in, or control the operation.

C. Tracing of Funds

The tracing of funds is usually time consuming and difficult, and often is impossible. According to Rooney, the time necessary to conduct the financial investigation can result in lost witnesses, uncooperative informants, fugitives, and statute of limitations problems that jeopardize the entire case.[57]

D. Inter-Agency Co-operation and Communication

Magarity emphasizes that most of the serious RICO prosecutions have involved lengthy, aggressive investigations, because the powerful figures behind illicit activities are usually able to insulate themselves from the tangible evidence of culpability. Therefore, investigations into organized crime, political corruption and white-collar crimes require vast co-operation between investigators and prosecutors. In addition to this required cross-agency correspondence, Magarity emphasizes the "breadth and complexity" of the statute and the knowledge of both federal and state law that is required.[58]

5. Definition of the Statute by Judicial Interpretation Rather Than By Legislative Action

Numerous writers emphasize that the courts have gone beyond the bounds permitted by the statutory language and have extended RICO in directions never intended by the Congress. Bradley argues that the unduly broad statute could have been cured by narrow judicial construction, but that instead "the courts, reflecting the national fear of racketeering, have extended RICO beyond the broadest boundaries."[59] Novotny, recognizes the necessity for courts to interpret a fairly new--or newly-tested--statute, but argues that the usual practice is for courts to employ specific rules of statutory interpretation, and to study congressional committee reports that reveal congressional intent:

> Unfortunately several courts have ignored and misused these tools...As a result, Title IX has been both unjustifiably expanded and unnecessarily restricted in some areas. This situation should warn the legislature and the public that courts have the power through improper use of statutory construction, to distort the meaning of a statute from that intended by the legislature. Hopefully, further judicial interpretations of Title IX will follow established rules of statutory construction and, as a result, render decisions that coincide with the intent of Congress.[60]

Novotny further argues that the "doctrine of ejusdem generis"[61] would dictate that all enterprises in Title IX must be legitimate organizations. This interpretation is reinforced by the "doctrine of lenity" which requires that if the meaning of a penal law is uncertain, it is to be construed in favour of the defendant and against enforcement of the law. Both of these guidelines would tend to vitiate the liberal construction and imaginative instructions of the statute as written.

In accord with these written instructions from the Congress, some observers criticize the courts for attempting to restrain the breadth of RICO by moving away from the liberal construction demanded by the statute, and therefore restricting its application.[62] This argument maintains that since the statute, as written by the Congress, demands a broad, imaginative application, then the courts should not restrict its use. If the wide use of RICO is seen as problematic, then the Congress should restrict it by re-writing the statute, not the judiciary restrict it via extraordinary court interpretations.

Robert Blakey, one of the drafters of the Organized Crime Control Act, has noted the failure of various courts to interpret RICO as broadly as, in his view, the Congress meant it to be interpreted. Blakey states that judges have "ignored the plain meaning of the statute (it says "any" enterprise);" and" misunderstood the meaning of the liberal construction directive."[63] RICO is not a criminal statute. Consequently, concern with lenity has no place in its construction;"[64] and that "there is nothing in RICO that says that, if legitimate businessmen act like racketeers, they should not be treated like racketeers."[65]

As mentioned elsewhere in this report, the issue over the interpretation of "enterprise" was finally resolved by the U.S. Supreme Court in U.S. v. Turkette, 452 U.S. 576 (1981), with the decision that an enterprise could be composed of persons associated solely for wholly illicit activities. This occurred after several lower courts had decided the debate in various ways. The variation in interpretation seems to stem from the Congressional desire to create a broad and powerful statute that would complete the arsenal of weapons with which to attack racketeering. In order not to trap every offender, no matter how minor, wide areas of interpretation seem to have been left to the courts to decide case by case--at least until the U.S. Supreme Court has ruled on each controversy.

A statement by Craig Palm sums up one side of this controversy:

> Congress has through the liberal construction clause, mandated the approach the courts should adopt when construing RICO. Unquestionably RICO is a broad statute designed to provide prosecutors and plaintiffs with an effective weapon against organized crime. If it catches too many in its broad criminal net, it is for Congress to amend the law, and not for the courts to emasculate it under the guise of interpretation.[66]

RICO: THE STRONG POINTS

This section deals briefly with three arguments in support of the statute.

1. One Weapon in a Larger Attack on Racketeering

The strongest argument in favour of RICO seems to be that it provides one more weapon against racketeering activities. Its recent supporters tend not to claim that it is the complete answer, or that it will eliminate organized crime, but that it is a powerful statute that can, in a significant number of cases, result in prosecutions with the potential of forfeiture that would be unavailable if RICO did not exist. One specific area where RICO has proven successful is in the prosecution of corrupt state officials.

2. Separation of the Racketeer From His Enterprise

The purpose of the forfeiture clause is to enable the government to separate the corrupt individual from the legitimate enterprise he is corrupting or from his involvement in an illegitimate enterprise. It is argued by RICO supporters that this is only possible through RICO.

3. Deterrence

It is argued by RICO supporters that when RICO is used more frequently, with more prosecutions being achieved more quickly, then the racketeering population may fear the strong punitive sanctions involved in a RICO prosecution. It is recognized however that deterrence will only be possible after the population becomes more familiar with this statute, and it is used with increased frequency by prosecutors and by private citizens seeking civil remedies. Much more research is required before sound policy claims based on deterrence can be made.

RICO: RECOMMENDATIONS FOUND IN THE ANALYSES OF RICO

Four of the main, recurring recommendations found in the literature from the United States are outlined below.

1. The 'Enterprise' element requires reformulation. The "pattern of racketeering activities" has been valuable, but the "enterprise" concept has been either written out by the courts or used to overly restrict RICO.

2. Programmes to familiarize the prosecutors and the public are necessary before a true evaluation of RICO can be made. The twelve years since the enactment of the statute present a false picture, since RICO has only been used significantly during the 1980's.

3. There is a need for more specificity in a rewritten statute as opposed to interpretations by courts.

4. Civil remedies for private citizens via treble damages may be inappropriate if the targeted group truly is organized crime, due to the potential for intimidation of citizens by criminals. If the emphasis is not on the organized criminal, this clause may result in too many suits for the courts to handle. In either instance, framers of new RICO statutes might want to re-evaluate the deterrent or restitutive benefits of the private-citizen civil-remedies clause.

VI. STATE RICO STATUTES: AN OVERVIEW AND COMPARISON

Fifteen individual States have enacted "little RICO" statutes modeled upon the Federal legislation, taking into account certain perceived deficiencies and court rulings. The following States have introduced either actual RICO statutes or comparable legislation:

Arizona[67]
California[68]
Colorado[69]
Connecticut[70]
Florida[71]
Georgia[72]
Hawaii[73]
Illinois[74] (pertaining to narcotics only)
Indiana[75]
New Jersey[76]
New Mexico[77]
Oregon[78]
Pennsylvania[79]
Rhode Island[80]
Wisconsin[81]

The Commonwealth of Puerto Rico also has a law in this area[82], but it will not be included in the following analysis. Plans for RICO laws are being discussed in Delaware, Louisiana, New York, Ohio, Tennessee and Illinois.[83] A brief discussion on the proposed New York "Organized Crime Control Act" has been included. The proposed Illinois Racketeer Influenced and Corrupt Organizations Act of 1983[84] was introduced into the State Senate on March 24, 1983, and may be passed into law as soon as June of 1983.

1. The Purpose of State Rico Statutes

States have enacted RICO legislation for two important reasons. First, implementation of the Federal RICO statute requires approval by the Organized Crime and Racketeering Section, Criminal Division of the U.S. Department of Justice in Washington.[85] The Department of Justice has established the policy that, with only limited exceptions, no RICO count will be authorized where the predicate acts consist solely of State offences. The central authorities take the position that the prosecution of State crimes is primarily the responsibility of State authorities. Therefore, criminals would be free from Federal RICO prosecution so long as they avoided commission of Federal predicate offences.

Second, there are too many cases; the Federal system cannot prosecute all of them effectively. The Oregon Attorney General has noted that:

> Prosecution of sophisticated 'organized crime' at the State level thus requires that States provide their own mechanism for such prosecutions. Adoption of State RICO's is a response to the fact that the Federal Government no longer has the resources to handle many problems which States believe require attention and a recognition that States must be prepared to deal themselves with these problems.[86]

Colorado, Florida, Georgia, New Mexico and Pennsylvania set out, in the preambles to their RICO statutes, purposes similar to those found in the Federal RICO statute, with special emphasis on preventing the subversion of the State economy and on compensating victims. The California pronouncement makes it clear that the Act should "be used by prosecutors to punish and deter only" criminal activities of "organized crime". "Organized crime" within the California statute is defined as crime which is of a conspiratorial and organized nature and (1) which seeks to supply illegal goods and services such as narcotics, prostitution, loan sharking and gambling, or (2) through planning and coordination of individual efforts, to conduct illegal activities of arson for profit, hijacking, insurance fraud, smuggling, operating vehicle theft rings, or systematically encumbering the assets of a business for the purpose of defrauding creditors.[87]

2. Key Terms

Although the State RICO statutes vary in the definition of certain terms, and though some fail to define key terms, a common thread runs through all the statutes. As under the Federal RICO statute, to violate a State RICO statute a person must acquire or maintain an interest in, control conduct, or participate in, the affairs of an enterprise through a pattern of racketeering activity or the collection of an unlawful debt. As in the Federal RICO statute, the key terms are:

(a) enterprise
(b) racketeering activity
(c) pattern of racketeering activity
(d) unlawful debt

A. Enterprise

Most of the Federal RICO case law analysis of this term has given it an expansive definition.[88] The United States Supreme Court decision, in U.S. v. Turkette[89], concluded that "enterprise" encompasses both legitimate and illegitimate enterprises.[84] The broadness of the term at the Federal level has resulted in either broad definitions at the State level or in some States the total removal of the concept.

The Florida definition of "enterprise", while incorporating the Federal definition, also represents a response to some of the pre-Turkette attacks on that definition in the Federal courts. The Florida legislature expanded its definition specifically to include sole proprietorships, business trusts, chartered or unchartered unions, licit and illicit enterprises, and governmental as well as other entities.[91] Oregon followed this expanded definition, as did Colorado, Connecticut, Georgia, Illinois, New Jersey and New Mexico.[92] The balance of the State RICO statutes contain more limited definitions but all seem broad enough to include the majority of illegal activities. The Colorado, Connecticut, Florida, New Jersey and Pennsylvania laws include "individual" within the definition of "enterprise". The term "enterprise" does not appear in the California RICO Act.

B. Racketeering Activity

The criminal activities listed under the Federal definition and those of the States are the predicate offences which must be proved before a pattern of racketeering activity can be established.

At the Federal level the predicate acts are principally limited to felonies. Four groups of crimes make up the definition of "racketeering activities":

(i) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion or dealing in narcotics or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year;

(ii) sports bribery, counterfeiting, embezzlement from pension and welfare funds, mail and wire fraud, obstruction of justice, obstruction of a criminal investigation, and interstate transportation of stolen property;

(iii) restrictions on payments and loans to labour organizations and embezzlement of union funds;

(iv) bankruptcy fraud, and dangerous drugs.

Only three of the "racketeering activities" are misdemeanors; all of the others are felonies. Of the three misdemeanors, two involve bankruptcy fraud and the third prohibits certain payments and loans to labour organizations.

The Colorado, Florida, Illinois, New Jersey, Oregon and Pennsylvania statutes, in addition to listing specific predicate offences, incorporate the Federal definition; thus, violation of one or more of the enumerated Federal statutes may constitute a predicate offence for purposes of finding that a pattern of racketeering activity exists under the State Acts. This inclusion is particularly important because of the broad scope of some of the Federal statutes.[93]

All the State RICO statutes include specific state criminal statutes, violations of which may constitute predicate offences for purposes of finding a pattern of racketeering activity. Some of the offences are misdemeanors. For example, the Florida statute includes misdemeanor offences such as gambling, pornography, and prostitution which the Florida Senate Committee on Judiciary-Criminal saw as activities that organized criminals would likely be involved with.[94] The New Jersey and Pennsylvania statutes include the provision that a charge may be laid even if the operative acts took place outside the jurisdiction of the state, if such acts would have been in violation of the law of the jurisdiction in which they occurred.[95] Finally, certain State RICO statutes define racketeering activity to include attempting to commit, conspiring to commit or soliciting, coercing or intimidating another person to commit predicate offences.[96] The proposed Illinois RICO statute contains possibly the most comprehensive formula:

"'racketeering activity' means engaging in, attempting to engage in, conspiring to engage in, or soliciting, coercing, or intimidating another person to engage in "any of the predicate offences. These offences are absent from the Federal statute with one exception: conspiracy to commit substantive RICO violations as a separate chargeable offence.[97]

C. Pattern of Racketeering Activity

The scope of the term "pattern of racketeering activty" is dependent upon the meaning of "racketeering activity" in a given State statute. The Federal statute requires at least two acts of racketeering activity, one of which occurred after the effective date of the legislation and the last of which occurred within the previous ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity. This definition permits the prosecutor to use episodes of racketeering activity which occurred before the Act was adopted to establish the existence of the pattern, so long as at least one event of racketeering activity took place after the effective date of the Act. Challenges based on the notion of the creation of ex post facto offences have been rejected by the Courts.[98]

The Florida statute adds to the federal definition of "pattern of racketeering activity" the requirement that the two incidents of racketeering activity "have the same or similar interest, results, accomplices, victims or methods of commission or otherwise are inter-related by distinguishing characteristics and are not isolated incidents".[99] This language is derived chiefly from United States v. Stofsky[100], and is an attempt to incorporate into the definition some of the Court interpretations of the Federal statute. The Florida definition has withstood challenges that it was unconstitutionally vague.[101]

The definition of "pattern of racketeering activity" in the Oregon statute repeats the words of the Florida statute, but adds the phrase, "including a nexus to the same enterprise". The addition of these words means that the Oregon definition of "pattern" follows the analysis of that term adopted in such Federal RICO cases Weisman, Elliot and Bright. A "pattern" can be found even though specific predicate offences of racketeering activity are not related to one another, so long as they are connected through a relationship to the same enterprise.[102] All but two of the State statutes contain provisions similar to those found in the Florida and Oregon statute; however, the Arizona and Hawaii statutes do not define "pattern of racketeering activity". This allows prosecution even when only one of the predicate offences is "committed for financial gain" (Arizona). The notion of a criminal "pattern" does not exist in Arizona. Only one of the numerous predicate offences enumerated in the Arizona RICO statute need be violated and financial gain derived from the commission of the offence, in order for a prosecution to ensue.

The Hawaii RICO statute also avoids the requirement of a pattern of racketeering and allows a prosecution where "income is derived, directly or indirectly, from a racketeering activity" (any offence which may be punished by imprisonment for more than one year) and that income is used to acquire an "enterprise". The Arizona and Hawaii legislatures, therefore, have diverged from the other States in the thrust of their RICO statutes. While profits from criminal activities are to be seized by the State, with a concomitant punishing and deterring of criminals, the offender need only have violated one predicate law.

For those States which require a "pattern of racketeering activity" to be established, the maximum period of time between the two predicate offences varies from state to state: 3 years (Illinois), 4 years (Georgia), 5 years (Connecticut, Florida, Indiana, New Mexico, Oregon), 10 years (California, New Jersey), to an unlimited period (Pennsylvania). The California RICO statute specifies that a prior act may not be used to establish a "pattern" if the prosecution for that act resulted in an acquittal.

It has been noted that (except in California):

> there is no requirement that a conviction involving the underlying predicate offences occur before those offences may be used to show a pattern of racketeering activity. The offences referred to are definitional only. The prosecutors need only prove that conduct violating the predicate offence statutes occurred, i.e., prove the elements of the underlying predicate offence, and prove that those violations constituted a pattern, in order to come within the definition of pattern of racketeering activity. Proof of these elements must, of course, be beyond a reasonable doubt.[103]

D. Unlawful Debt

The Federal RICO describes an unlawful debt as a debt (i) incurred or contracted in gambling activity or (ii) unenforceable because it contravenes Federal or State laws concerning usury or (iii) incurred in connection with the business of gambling or (iv) where the usurious interest rate was at least twice the enforceable rate.

The Colorado, Connecticut, Florida, Hawaii, Illinois, New Jersey, Oregon and Rhode Island statutes include similar definitions. The rest of the State RICO laws do not specifically define "unlawful debt", but it is fair to say that the collection of an unlawful debt is subsumed under the definition of "racketeering activity". The Pennsylvania RICO statute defines racketeering activity" to mean: "the collection of any money or other property in full or partial satisfaction of a debt which arose as the rate of interest exceeding 25% per annum or the equivalent rate for a longer or shorter period, where not otherwise authorized by law".[104]

The Georgia, Indiana and New Mexico statutes do not specifically include the collection of an unlawful debt under the "prohibitied activities", but merely prohibit "extortion" under the definition of "racketeering activity". Indiana has a statute separate from RICO to deal with "loansharking".[105]

E. Prohibited Activities

The Federal RICO statute outlines three major areas of unlawful activity:

a) To use income derived from a pattern of racketeering activity or through the collection of an unlawful debt to acquire any interest in real property or in an enterprise;

b) to acquire or maintain, through a pattern of racketeering activity or through the collection of an unlawful debt, an interest in real property or an enterprise;

c) to conduct an enterprise through a pattern of racketeering activity or the collection of an unlawful debt;

These provisions, among others, are to be liberally construed to achieve the remedial purposes of the Act.

The RICO statutes of Colorado, Connecticut, Florida, Hawaii, Indiana, New Jersey, New Mexico, Oregon, Pennsylvania and Rhode Island include the Federal catalogue of prohibited activities. The Arizona and Georgia laws limit the categories of prohibited activities, but the thrust is almost identical to all other RICO statutes.

One provision which appears in only a few of the RICO statutes deals with the purchase of securities for the purpose of investment. The Federal statute provides an exemption whereby a purchase of securities shall not be unlawful if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices involved in any pattern of racketeering activity, or the collection of an unlawful debt:

> do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to affect one or more directors of the issuer.[106]

Essentially the same provision is contained in the statutes of Colorado, New Jersey, Pennsylvania and Rhode Island. The New Jersey and Pennsylvania laws further stipulate that if, in any proceeding involving an alleged investment in violation of this section, it is established that over one-half of the defendant's aggregate income for a period of two or more years immediately preceeding the investment was derived from a pattern of racketeering activity, a rebuttable presumption shall arise that the investment included income derived from a pattern of racketeering activity.

3. Penalties

A. Criminal Penalties

(i) Fines, Imprisonment and Forfeiture

The Federal RICO statute provides for a maximum fine of $25,000 or imprisonment for up to 20 years, or both, and forfeiture of all interests in the enterprises which were the subject of the organized criminal activity.

The State statutes provide comparable penalties in terms of fines, imprisonment and foreiture. However, the Florida, Colorado and Oregon RICO laws provide for special fines which could exceed $25,000. A fine that does not exceed three times the gross value gained through criminal activities, or three times the gross loss caused, whichever is the greater, plus court costs and the costs of investigation and prosecution, reasonably incurred, may be levied. A special hearing is held to determine the amount of this fine.

State forfeiture provisions divest the defendant of all interests in the illegal enterprises through seizure of the foreited property by State officials.

(ii) "Freezing" of Assests

The Federal RICO statute provides for pre-conviction measures which may have a significant effect on a defendant's freedom to deal with property. Once an action is commenced, the District Courts have jurisdiction to issue "restraining orders or prohibitions or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper".[107] The Colorado, New Jersey and New Mexico statutes include similar provisions under the criminal penalties section of their respective Acts. The other State laws provide for such measures under "civil remedies" sections.

B. Civil Remedies

The civil remedies under the Federal and State statutes are useful both to prosecutors and to victims of organized crime. The Federal Act gives jurisdiction to the District Courts to make a number of orders concerning a defendant's right to deal with his property. He may be ordered to divest himself of any interest in it; he may have his activities with respect to an enterprise restricted; he may be prohibited from certain activities; his enterprise may be dissolved or reorganized.

Restraining orders, performance bonds and other measures may be taken during the proceedings. The defendant's property may be tied up very early in the legal process by interlocutory restraining orders and, upon a determination of liability, he will be prohibited from engaging in the same illegal enterprises and will forfeit all gains. He will also be liable to pay all costs and expenses of the prosecution and investigation. Either the State or a private citizen may invoke civil law procedures, and the State may act on a citizen's behalf.

Most State Acts provide for treble damages to be awarded to someone injured by racketeering. Punitive damages may also be awarded. The plaintiff may also be awarded costs, including the costs of investigation and litigation. Where property of the defendant is sold, the proceeds will first be distributed among the victims; the balance will be awarded to the State.

Civil remedies under the State Statutes are supplemental and not mutually exclusive: a RICO violation may result in both criminal prosecution by the State and civil action by the State or victims against the same defendant for the same RICO violation. Any number of victims may seek civil relief under RICO from the same defendant. Moreover, the civil remedy will be the likelier vehicle because of the standard of proof. The plaintiff need only establish his case on "a preponderance of the evidence" ("balance of probabilities") rather than the criminal standard of "beyond a reasonable doubt." Another technical advantage is that a civil plaintiff will have the full range of discovery proceedings available, including subpoena and deposition of witnesses. Furthermore, grants of immunity from criminal prosecutions may be used to compel defendants in civil actions to produce information which may be used against defendants or their associates in a civil proceeding.[108]

Most State RICO Acts stipulate, with respect to a convicted person's rights at a subsequent civil proceeding regarding the same fact situation, that a conviction in a RICO criminal proceeding will estop the defendant in any subsequent civil proceeding as to all matters proved in the criminal proceeding.[109]

Most State RICO Acts also establish a limitation period with respect to instituting civil proceedings. In Arizona a plaintiff has 7 years to institute an action from the "discovery" of the violation. In Florida, Georgia and Illinois, an action may be commenced up until 5 years "after the conduct terminates or the cause of action accrues". In Illinois this period may be extended where "any longer statutory period...may be applicable". Connecticut law does not appear to include a limitation period specifically with respect to RICO civil litigation.

C. Lien Notice (Connecticut, Florida and Illinois)

Civil remedies are advantageous to the State and to victims of crime, but the practical difficulty remains that assets, although subject to forfeiture, may be impossible to trace. To help prevent the dissipation or "hiding" of assets through trusts, foreign corporations and under fictitious names, certain State legislatives have introduced the "Lien Notice" through their RICO statutes. Upon instituting a criminal or civil action, the Lien Notice may be filed in all appropriate registry offices against property in which a defendant has an interest. The Lien is effective upon filing and the State title to forfeited property relates back to the filing of the Notice.[110]

The Florida legislature created the Lien Notice mechanism, which has been adopted by Connecticut and is included in the proposed Illinois bill. The Florida Lien Notice would seem to pertain only to "real" property, i.e., land, whereas Notices in Connecticut and Illinois would attach to both real and personal property.[111]

In all three States, the State interest is superior to all other interests which may be acquired after the filing of the Notice. The Notice lasts for six years and a further renewal of six years duration is permitted. The person named in the Notice should be served personally with this document (in Connecticut and Florida) but, if service is not possible, the Notice is still valid. Illinois does not require personal service, but stipulates service by certified mail. Failure to furnish a copy of the Notice does not invalidate the proceedings.[112]

If no civil proceeding has been started by the investigative agency (State Attorney General) seeking a forfeiture, the acquittal in the criminal proceeding of the person named in the Notice or the dismissal of the criminal proceeding shall terminate the Notice. The Notice continues for the duration of any civil proceedings.[113]

If no civil proceeding is pending against the person named in the Notice, he may start an action to expunge the Notice. The person named in the notice bears the burden of showing, on the preponderance of the evidence, "that the racketeering Lien Notice is not applicable to him or that any personal or real property or beneficial interest in it owned by him is not subject to forfeiture".[114]

The person named in a RICO Lien Notice may use the property (e.g., receive rent) during the duration of the Notice, but may not sell it.[115]

If there is a judgement of forfeiture, the State title shall date back to the filing of the Notice.[116] The State will take all interests, both legal and "beneficial" (equitable). In Florida, the Lien Notice deals only with real property; personal property is dealt with by seizure. The State title to personal property relates back to the time of seizure.[117] In Illinois, which has the most comprehensive provisions dealing with Lien Notices, title in personal property can relate back to either its seizure by the State or the filing of the Lien Notice.

The Connecticut RICO statute contains provisions for appeals arising from disputes concerning the filing of the Notice.[118] The Florida Act is silent with respect to appeals, as is the draft Illinois Bill.[119]

D. Investigation of Records

Most of the State Acts (e.g., Arizona, Colorado, Florida, Hawaii, New Jersey, Pennsylvania, and Rhode Island) provide procedures for the investigation of pertinent records by the Attorney General. A third party, for example a bank, may be compelled to procure documents which are believed to bear upon alleged racketeering activity.[120] These investigations may be carried out prior to any criminal or civil proceedings being commenced.

The proposed Illinois Bill includes the most extensive provisions concerning the powers of the Attorney General to conduct searches of records and compel attendance of witnesses before the start of any civil or criminal proceeding.[121]

E. Granting of Immunity

The proposed Illinois Bill includes the power to compel a person to produce evidence "at a hearing or trial...or at an investigation brought by the Attorney General" (where documents are being searched, compiled, etc.). The person subpoenaed may not refuse to produce evidence on the grounds of self-incrimination. The Attorney General may obtain an ex parte order from the Circuit Court by certifying that:

(1) the production of the evidence may be necessary to the public interest; and

(2) the person has refused or is likely to refuse to produce evidence on the basis of his privilege against self-incrimination.

If the person refuses to comply with the order, he may be punished for contempt.[122]

The evidence so produced may not be used against the person at a subsequent criminal trial; however, it would seem that the person may be compelled to incriminate himself at a civil proceeding and that an order of forfeiture could result due to this testimonial compulsion.[123]

A recent article in the Los Angeles Times points out that in Arizona, a Court may infer guilt where a defendant refuses to answer questions for a pre-trial disposition.[124] Thus, the Illinois proposal to abrogate the right against self-incrimination (the Fifth Amendment to the U.S. Constitution) may simply be a legislative recognition of the development of case law in American civil procedure. It would be the first of several advantages which a plaintiff enjoys in a civil suit against an alleged "racketeer". Others are discussed below.

4. Advantages of Civil Redress to the State and Individuals

A. Burden of Proof

One of the main advantages for the plaintiff in the civil RICO prosecutions is that he need only establish the commission of the "pattern of racketeering activity" on a preponderance of the evidence in order to succeed in a civil suit.[125] No finding of criminal guilt need be made before the civil suit is instituted. The "popularity" of the civil action is shown in Arizona; only two criminal RICO cases have been brought since the law went into effect in the fall of 1978, but 14 civil cases are alleged to have curtailed narcotics, theft, and other illegal operations, as well as legitimate fronts, all of which are termed enterprises under RICO.[126] As noted above, Arizona and Hawaii are unique in that a plaintiff need not even establish a pattern of racketeering activity.

Specifically with respect to the burden of proof, an Arizona prosecutor has noted:

> I'd say 60% of our cases are referred by police who are short on evidence for a criminal case. Say you have an arson case the police can't quite prove. We'll try it as a civil case. I can haul the guy in for a deposition and ask him leading questions, which I couldn't do in a criminal procedure.[127]

B. Interlocutory Proceedings

To be effective, both Federal and State RICO statutes must utilize legal measures to ensure that forfeitable property is not disposed of before the issues in question are determined at trial. In this respect, most of the State RICO Acts provide for the State Attorney General, or the responsible State agency to apply to the appropriate court to enter such injunctions, prohibitions, or restraining orders, or take such actions, including the acceptance of satisfactory performance bonds, as the court may deem proper.[128] When, a RICO civil action is commenced by an "aggrieved person", an application may be brought for such injunctions, prohibitions or restraining orders. The Florida statute provides that:

> ...in such proceeding, relief shall be granted in conformity with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, except that no showing of special or irreparable damage to the person shall have to be made. Upon the execution of proper bond against damages for an injuction improvidently granted and a showing of immediate danger of significant loss or damage, a temporary restraining order and a preliminary injunction may be issued in any such action before a final determination on the merits.[129]

Similar provisions are found in the Arizona, Colorado, and Georgia RICO statutes, and in the proposed Illinois RICO legislation.

The Connecticut RICO statute includes provisions to prevent "transferring, depleting or otherwise alienating or diminishing any property", to appoint a receiver "over such property which there is probable cause to believe is subject to forfeiture under this Act", or to allow the defendant to transfer or deplete his assets upon posting security equal to the value of the property.[130] The Court may make any other order, consistent with due process of law, that the Court deems to be reasonable and necessary to protect the rights of any innocent person or entity or to effectuate the purposes of this Act.[131]

Under the Hawaii statute an individual plaintiff would not appear to have the right per se to seek a preliminary injunction or restraining order. However, the Attorney General does have such right and it is presumed that the State will often act on behalf of aggrieved parties. The New Jersey RICO statute, is similar to the Hawaii statute. Under the New Mexico statute, the individual plaintiff is not given the right to obtain an interlocutory order, but the State may act on his behalf.[133] Under the Pennsylvania law, no specific stipulation is made as to who may bring an action. There are provisions for "preliminary or special injunctions...including the acceptance of satisfactory performance bonds."[134] The Rhode Island statute gives the Attorney General the right to request an injunction.[135]

C. Seizure

Not all State RICO laws provide for the seizure of a defendant's property prior to trial. Some provide for a "lien notice" to attach to real property prior to any determination of guilt or liability. There is no universal declaration of procedures to be followed with respect to seizure.

The following wording from the Florida statute is typical of many State RICO Statues:

> Property subject to forfeiture under this section may be seized by a law enforcement officer upon Court process.
>
> Seizure without Court process may be made if:
>
> a) the seizure is incident to a lawful arrest or search or an inspection under an administrative inspection warrant;
>
> b) the property subject to seizure has been the subject of a prior judgment in favour of the State in a forfeiture proceeding based upon this section.

> In the event of a seizure, a forfeiture proceeding shall be instituted promptly.[136]

It would appear that no civil or criminal proceedings need necessarily to have been initiated before the seizure is executed. However, a "forfeiture proceeding" will be promptly brought before the Courts. The proof required at this hearing will apparently be "on a preponderance of the evidence". With respect to the Florida statute, upon entry of a final judgement of forfeiture, the State will have title to all real property dating back to the imposition of the lien notice.[137] The State has a claim to personal property as of the date of seizure. An injured party's interests in the forfeited property rank ahead of the State interest.[138]

The Georgia law provides specific guidelines for forfeiture proceedings.[139] A "RICO forfeiture proceeding" is an _in rem_ proceeding against the property and is instituted by complaint. The proceeding "may be commenced before or after seizure of the property".[140] "Pending final judgment in the forfeiture proceeding, the Court may make any other disposition of the property which is in the interest of substantial justice".[141] There must be a determination by the Court, when listening to the complainant _ex parte_, "that reasonable cause does exist to believe that the property is subject to forfeiture". If such a finding is made, the Court then considers whether a writ of seizure should be issued forthwith, without notice to the proposed defendant(s), or whether a further hearing should be held with all parties present. If the Court is convinced that "prior notice would cause loss or destruction, it shall without any further hearing or notice issue a writ of seizure directing the Sheriff of the County where the property is found to seize it."[142]

In summary, the Colorado, Connecticut, Florida, Georgia and Oregon RICO statutes stipulate that property may be seized prior to either a civil or criminal trial. The placing of a "RICO Lien Notice" (Connecticut, Florida and Illinois) against real property interests of a defendant is equivalent to seizure. In a forfeiture proceeding the defendant's liability will be determined on a preponderance of the evidence.

D. Forfeiture

Most State RICO statutes stipulate that one of the penalties attached to a criminal conviction for racketeering is the forfeiture to the State of all interests in the racketeering activities. The defendant in that situation has had a case made out against him beyond a reasonable doubt. In civil forfeiture proceedings, he may find himself liable on a preponderance of the evidence. Should he have been convicted and then sued civilly, most State RICO laws provide that he will be estopped from denying allegations which were proved against him at the criminal trial.

Most State Courts are empowered to order more than the forfeiture of assets. A defendant found liable under the civil section of most RICO laws will be restrained from engaging in similar activities which were the subject-matter of the suit, and will be ordered to divest himself of any interest in any enterprise as the Court sees fit.[143] Moreover, the Court may order the charter of a corporation to be forfeited or suspend or revoke its licence to operate. An enterprise may be dissolved or reorganized.[144]

Most State RICO statutes establish situations wherein a defendant's assets may be "frozen" before a hearing brings about a resolution. It would appear, and the case law brings it out, that civil actions are the preferable mode of enforcement, because of the lower standard of proof. The defendant could conceivably forfeit his entire assets in a shorter time period than if he were being subject to a criminal proceeding.

5. New York State's Organized Crime Control Act of 1983.

This Bill[145] argues that "one major cause of the continuing growth of organized crime activities within the State is the inadequacy and limited nature of sanctions and remedies available to State and local law enforcement officials to deal with this intricate and varied criminal conduct". The Bill is intended to permit "law enforcement authorities (i) to charge and prove patterns of criminal activity and their connection to ongoing enterprises, legitimate or illegal, that are controlled or operated by organized crime, and (ii) to apply criminal and civil penalties designed to prevent and eliminate organized crime's involvement with such enterprises".[146]

A. Definitions

"Enterprise" is defined in similar terms to those found in the more comprehensive RICO statutes. An enterprise can consist of a single individual or a group, be either licit or illicit and include organized crime enterprises, corporate as well as political/governmental enterprises.[147]

A "pattern of criminal activity"[148], "is defined as engaging in at least three acts of racketeering activity". Moreover, "at least two of the acts, one of which was a felony" must have "occurred within five years, excluding any period of imprisonment, of the commencement of a criminal or civil action and the last of such acts occurred within three years after a prior act of enterprise corruption". Therefore, a maximum three-year period gap is allowed between the commission of the predicate offences. These offences must be related to the running of the enterprise and cannot be merely isolated incidents. As well, there is a five-year limitation period for the prosecution of an alleged offender.[149]

As noted above, the "pattern" must contain at least one felonious predicate offence. This is to avoid the possibility of someone being convicted under the RICO statute for committing a series of misdemeanors.

The "prohibited activities"[150] resemble those found in the Federal RICO. However, with respect to investing in enterprises, the New York Bill uses the term "proceeds" rather than "income" from a pattern of criminal activity.[151] "Proceeds" is a broader term and its use avoids the argument by the alleged offender that he cannot be convicted unless he personally received income from crime.

B. Criminal Penalties

(i) Forfeitures

Any person convicted of enterprise corruption may be required to "forfeit to the State any interest, including proceeds, he has acquired or maintained...and any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over any enterprise which he has established, operated, controlled, conducted or participated in the conduct of..."[152]. The convicted person's interests may be forfeited after a jury has rendered a conviction for "enterprise corruption" and determined that the interest is subject to forfeiture. Alternatively, after a verdict of forfeiture, the Court may hold a "forfeiture hearing". A defendant may be allowed to adduce further evidence and third parties may also make representations. The Court may set aside or modify the verdict of forfeiture "if it finds that the defendant has established by a preponderance of the evidence that the property...is not subject to forfeiture or if it finds that the other person has established that he, and not the defendant, owned the property...".[153]

(ii) Other Criminal Penalties

In the absence of a forfeiture order and "in lieu of the fine authorized by this section" (the amount of which is not stated), the "standard" fine of triple the gross value of illegal profits or loss caused may be levied, after a hearing.[154]

Injunctions, prohibitions, or restraining orders may be entered prior to any final order of judgement.[155]

C. Civil Remedies

(i) A Civil Proceeding

This may be commenced, either by a private citizen or the State, within five years after the unlawful activity "terminates or the cause of action accrues". However, it should be noted that where the State is acting on behalf of an individual complainant, the running of the limitation period does not commence until two years have elapsed since the end of any other related criminal or civil proceedings.[156]

Any individual complainant must notify the Attorney General of his institution of proceedings. The Attorney General has the discretion to "intervene in that proceeding if he certifies that in his opinion the proceeding is of general public importance".[157] An individual complainant may be awarded treble damages plus extensive (but "reasonable") costs.[158]

The State may obtain the "standard" final orders concerning divesting, dissolution, revocation, prohibition, etc.[159] Pending final determination, the Supreme Court may, at any time, enter such injunctions, prohibitions or restraining orders or take such actions, including the acceptance of satisfactory performance bonds, as the Supreme Court may deem proper.[160] It would seem that these interlocutory orders may be obtained by either the State or an individual.[161] The defendant or any injured person may demand a jury trial.[162]

Civil remedies are supplemental and not mutually exclusive.[163] A conviction in criminal proceedings estops a defendant from denying material allegations in a civil suit.[164] The injured person has a superior right with respect to any forfeited property vis à vis the State.[165]

(ii) Civil Forfeitures

The Court is under a duty "to determine if a lawful claimant to the property has been identified or is identifiable". The police and other "public officers or officials" are under a duty to report any knowledge of a lawful claimant to the Court.[166]

The Court shall remit the forfeiture of property when the lawful claimant asserts and "establishes his legal interest in the property and establishes that its unlawful use or procurement was without his knowledge and consent". It would seem, therefore, that any interested third party who can establish standing before the Court will have an opportunity to be heard.[167]

(iii) Criminal Activity Lien Notice

The details with respect to this Notice are very similar to those found in the RCIO statutes of Connecticut and Florida and, most particularly, the proposed Illinois Bill. As in Illinois' Bill, the Lien attaches to both real and personal property.[168]

An interesting provision deals with "trustee nonreporting", viz., a trustee who holds title to property against which a Lien has been filed must tell the prosecutor the name and address of the beneficiary and provide a copy of the trust agreement.[169] This provision will be useful in situations in which property is transferred in an attempt to avoid its seizure.

The alleged offender may use the property, unfettered by the Lien, except to the extent that he may not sell the property.[170] The Lien lasts for six years and may be extended for a further six years.[171]

Any party who has an interest in the property which is covered by the Notice, whether or not he is named in the Notice, may attempt to have the Notice expunged. The burden lies with the applicant, on a civil standard, to have the Notice expunged.[172]

D. Appeals

An appeal may be taken, as of right, by anyone other than the defendant, from a forfeiture order. The defendant needs leave to appeal. This Bill, unlike most RICO statutes contains a fairly detailed procedure for appeals.[173]

REFERENCES

1 See 18 U.S.C. Section 1961-1968 (1970); reproduced as Appendix A of this document.

2 Ibid.

3 "Person" is defined as "any individual or entity capable of holding a legal or beneficial interest in property": 18 U.S.C. Section 1961(3).

4 "Pattern of racketeering activity" is defined as "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity": 18 U.S.C. Section 1961(5).

5 See Appendix A.

6 Ibid.

7 "Enterprise" is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity": 18 U.S.C. Section 1961(9).

8 See Appendix A.

9 "Racketeer Influenced and Corrupt Organizations. White Collar Crime: Second Annual Survey of Law," 19 American Criminal Law Review 351 (1982). Cited hereinafter as Am. Crim. L. Rev.; see also Robert Blakey and Ronald Goldstock, "On the Waterfront: RICO and Labour Racketeering," 17 Am. Crim. L. Rev. 341 (1980). Cited hereinafter as Blakey and Goldstock.

10 Section 1962(b): "It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain directly or indirectly, any interest in or control of any enterprise which is engaged in or the activities of which affect, interstate or foreign commerce".

11 503 F.2d 430 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975).

12 See 19 Am. Crim. L. Rev., supra note 9, at 362.

13 Section 1962(c): "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign

commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt".

14 See 19 Am. Crim. L. Rev., supra note 9, at 362.

15 Section 1962(d): "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section".

16 For a critical view of conspiracy under the RICO statute see 19 Am. Crim. L. Rev., supra note 9, at 362; and Craig Bradley, "Racketeers, Congress and the Courts: An Analysis of RICO", 65 Iowa Law Review 837 (1980). Cited hereinafter as Bradley.

17 See Appendix A.

18 U.S. v. Scotto, 641 F.2d 52 (RICO upheld as not unconstitutionally vague, citing cases); U.S. v. Aleman, 609 F.2d 305 (broad scope not synonymous with "vagueness"); U.S. v. Hawes, 529 F.2d 472, 478-79 (5th Cir. 1976) (understandable to persons of common intelligence). See generally U.S. v. Martino, 648 F.2d 380 (summary of answers to constitutional arguments against RICO). Cited in 19 Am. Crim. L. Rev., supra note 9, at 358 note 1450.

19 101 S. Ct. 2524, 2527-29; see also Chaim Kiffel, "Reading the 'Enterprise' Element Back Into RICO: Sections 1962 and 1964(c)", 76 Northwestern University Law Review 100 (1981).

20 Whitney Schmidt, "The Racketeer Influenced and Corrupt Organizations Act: An Analysis of the Confusion in Its Application and A Proposal for Reform", 33 Vanderbilt Law Review 441 at 450 (1980). Cited hereinafter as Schmidt.

21 See William Taylor, III, "Forfeiture Under 18 U.S.C. Section 1963 - RICO's Most Powerful Weapon", 17 Am. Crim. L. Rev. 379 at 380 (1980). Cited hereinafter as Taylor.

22 For further information on criminal forfeiture see Blakey and Gettings, infra note 42; Bradley, supra note 16; and Daved Smith and Edward Weiner, Criminal Forfeitures Under the RICO and Continuing Criminal Enterprise Statutes (Washington, D.C.: Criminal Division, United States Department of Justice, 1980). Cited hereinafter as Smith and Weiner. See also, U.S. Department of Justice, An Explanation of the Racketeer Influenced and Corrupt Organizations Statute (Washington, D.C.: Criminal Division, 1980). Cited hereinafter as U.S. Department of Justice.

23 See Smith and Weiner, supra note 22; and Taylor, supra note 21.

24 See Smith and Weiner, supra note 22.

[25] *Ibid*.

[26] *Ibid*., at 32.

[27] *Ibid*., at 34.

[28] *Ibid*., at 39.

[29] U.S. v. L'Hoste, 609 F.2d 796 (1980); *U.S. v. Marubeni America Corp*., 611 F.2d 763 (1980).

[30] Senate Bill 2320, 97th Congress, 2d Session, Calendar No. 749, in the Senate, February 22, 1982.

[31] Senate Report No. 97-S20, 97th Congress, 2d Session, July 12, 1982, at 7.

[32] *Ibid*., at 9.

[33] See *Gross v. Ricciardi* (D.N.J.) and *Goberman v. Parness* (D.N.J.)

[34] 502 F.2d 1351 (1974).

[35] N.D. Ill., June 29, 1976.

[36] See *The Organized Crime Control Newsletter* No. 18 (May, 1975), for a summary of the speech.

[37] National Association of Attorneys General Committee on the Office of Attorney General, *The Use of Civil Remedies in Organized Crime Control*, at 6-7 (July, 1977).

[38] See also Kiffel, *supra* note 19, at 128.

[39] Schmidt, *supra* note 20, at 480.

[40] See Appendix A.

[41] Jeff Atkinson, "Racketeer Influenced and Corrupt Organizations 18 U.S.C. Section 1961-88: Broadest of the Federal Criminal Statutes", 89 *The Journal of Criminal Law and Criminology* 1, at 15-17 (1978). Cited hereinafter as Atkinson.

[42] Robert Blakey and Brian Gettings, "Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts - Criminal and Civil Remedies", 53 *Temple Law Quarterly* 1009, at 1040 (1980). Cited hereinafter as Blakey and Gettings.

[43] Barry Tarlow, "RICO: The New Darling of the Prosecutor's Nursery", 49 *Fordham Law Review* 165, at 306 (1980). Cited hereinafter as Tarlow.

44 American Bar Association, Report to the House of Delegates Section of Criminal Justice, at 4 (January, 1982). Cited hereinafter as ABA Report.

45 Ibid., at 5.

46 Thomas Gardner and Victor Manian, Criminal Law: Principal Cases and Readings at 10 (New York, N.Y.: West Publishing Company, 1975).

47 Connally v. General Construction Co., 269 U.S. 385, 46 S. Ct. 126 (1926).

48 See Taylor, supra note 21, at 398.

49 Title IX 904(a), 84 stat. 947, (1970)

50 David DaCosta, "Liberal Construction of Title IX of the Organized Crime Control Act of 1970: Section 904(a) v. The Doctrine of Strict Construction", 12 Rutgers Law Journal 69, at 75-77 (1980). Cited hereinafter as DaCosta.

51 Ibid.

52 See Bradley, supra note 16; and Kiffel, supra note 19.

53 Interview with John Dowd, Attorney in charge of U.S. Department of Justice Strike Force 18. Cited in Atkinson, supra note 41, at 16.

54 Schmidt, supra note 20, at 455.

55 ABA Report, supra note 44, at 12-13.

56 U.S., Comptroller General, Asset Forfeiture--A Seldom Used Tool in Combatting Drug Trafficking, at 61 (Washington, D.C.: General Accounting Office, 1981).

57 Ibid., at 68.

58 Gregory Magarity, "RICO Investigations: A Case Study", 17 American Criminal Law Review 367, at 368-371 (1980). Cited hereinafter as Magarity.

59 See Bradley, supra note 16, at 838.

60 David Novotny, "Title IX of the Organized Crime Control Act of 1970: An Analysis of Issues Arising in its Interpretation", 27 DePaul Law Review, 89 at 112 (1977). Cited hereinafter as Novotny.

61 The "Doctrine of ejusdem generis" counsels courts to construe the broad language in light of the narrow in a common sense recognition that general and specific words, when present together, are associated with and gain color from each other. Ibid., at 95-96.

62 Robert Blakey and Mitchel Goldsmith, "Criminal Redistribution of Stolen Property: The Need for Law Reform", 74 Michigan Law Review 1511, at 1512 (1976).

63 Blakey and Gettings, supra note 42, at 1025-1026, note 91, and at 1032 note 112.

64 Ibid., 1027.

65 Ibid., 1029.

66 Craig Palm, "RICO and the Liberal Construction Clause", 66 Cornell Law Review 1 (1980).

67 Ariz. Rev. Stat. Ann. s. 13-2312.

68 Cal. Penal Code s. 186.

69 17 Colo. Rev. Stat. s. 17-101.

70 Conn. P.L. No. 82-343.

71 Fla. Stat. Ann. s. 895.01.

72 Ga. Code Ann. s. 26-3401.

73 Haw. Rev. Stat. s. 842-1.

74 Ill. P.L. 940 (refers only to narcotics).

75 Ind. Code Ann. s. 45-6-2.

76 N.J. Stat. Ann. 2C: 41.

77 N.M. Stat. Ann. 30-42-1.

78 Or. Rev. Stat. 166-715.

79 18 Pa. Cons. Stat. s. 911.

80 R.I. Gen. Laws s. 7-15-1.

81 Wis. Stat. Ann. s. 946.80.

82 P.R. Laws Ann., Title 25, 971 (1979).

83 James Granelli, "Playing for keeps with State RICO", *The National Law Journal*, July 5, 1982, at 8, quoting Professor Robert Blakey, a principal draftsman of the federal RICO.

84 Senate Bill 508

85 See memorandum from Philip Heymann, Attorney General, Criminal Division, to all U.S. Attorneys, Section Chiefs, and Strike Force Chiefs, January 16, 1981, establishing guides for RICO prosecutions (Washington, D.C.: Internal Memorandum, U.S. Department of Justice).

86 David Frohnmayer, *et al*. "RICO: Oregon's Message to Organized Crime", 18 *Willamette Law Review* 1, at 5 (1982). Cited hereinafter as Frohnmayer.

87 *Supra*, note 68, s. 186.2(d).

88 For example, various governmental agencies have been found to constitute RICO "enterprises". *United States v. Karas*, 624 F.2d 500 (4th Cir. 1980), *cert. denied*, 101 S.Ct. 857 (1981) (county law enforcement agency). *United States v. Dozier*, 49 F.2d 554 (D. La. 1980) (Louisiana Department of Agriculture); *United States v. Sisk*, 476 F.Supp. 1061 (D. Tenn. 1979) (governor's office); *United States v. Barber*, 476 F.Supp. 182 (D. W.Va. 1979) (W. Virginia Alcohol Beverage Control Commission); *United States v. Vignola*, 464 F.Supp. 1091 (D. Pa. 1979), *eff'd*, 605 F.2d 1199 (3d Cir. 1979), *cert. denied*, 444 U.S. 1972 (1980) (Philadelphia Traffic Court). Although the great majority of federal courts faced with the question have decided that governmental organizations may continue RICO "enterprises", at least one court has held to the contrary. See *United Stated v. Mandel*, 415 F.Supp. 997 (D. Md. 1976), *supplemented* 415 F.Supp. 1025 (1976). Businesses and labor unions have been found to be RICO "enterprises" under the federal definition: *United States v. Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979) (restaurant); *United States v. Weatherspoon*, 581 F.2d 595 (7th Cir. 1978) (beauty college); *United States v. Kaye*, 556 F.2d 855 (7th Cir. 1977), *cert. denied*, 434 U.S. 921 (1977) (labor union).

89 101 S.Ct. 2524 (1981).

90 *Ibid*., at 2527.

91 Para. 943.461(3) (1980).

92 See the RICO statutes of the respective States.

93 See, e.g., 18 U.S.C. 1341 (1976) (relating to mail fraud).

94 Raymer Maguire III, "Racketeers and Non-Racketeers Alike Should Fear Florida's RICO Act", 6 *Florida State U. Law Rev.* 483 at 499 (1978). Cited hereinafter as Maguire. Maguire also argues persuasively that several other misdemeanor offences included as predicate offences under the Florida statute are unrelated to racketeering and organized crime and therefore should be deleted from the statute.

95 *Supra*, note 79, para. 911(h). For New Jersey's provision see *supra*, note 76, para. 2 C:41-2.

96 The States are: California, Colorado, Connecticut, Florida, Georgia, Indiana, Pennsylvania.

97 16 U.S.C. 1962(d) (1976).

98 See *U.S. v. Brown*, 555 F.2d 407 (5th Cir. 1977) *reh. denied*, 559 F.2d 29 (1977), *cert. denied*, 435 U.S. 904 (1978); *U.S. v. Campanale*, 518 F.2d 352 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976), *reh. denied*, 424 U.S. 950 (1975); *U.S. v. Field*, 432 F.Supp. 55 (S.D.N.Y. 1977), aff'd, 578 F.2d 1371 (2d Cir. 1978), *cert. dismissed*, 439 U.S. 801 (1978).

99 *Supra*, note 71, para. 943.461(4) (1980). The Florida definition of "pattern of racketeering activity" is phrased in terms of "two incidents of racketeering *conduct*" (emphasis added) even though the Florida RICO defines the predicate offences as "racketeering activity" rather than "racketeering conduct". This definitional oversight was carried over into the Oregon RICO: see *supra*, note 78, para. 2(3).

100 409 F.Supp. 609 (S.D.N.Y. 1973), aff'd on other grounds, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976).

101 *Moorehead v. State*, 383 So. 2d. 629 (Fla. 1980).

102 See Frohnmayer, *supra*, note 86, at 10; and see this paper *supra*, at 12-14.

103 *Ibid.*, at 12, citing in support *U.S. v. Malatesta*, 583 F.2d 748 (5th Cir. 1978), reh. *en banc*, 590 F.2d 1379 (1979) *cert. denied*, 440 U.S. 962 (1979), *cert. denied*, 444 U.S. 846 (1979); *U.S. v. Frumento*, 563 F.2d. 1083 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978).

104 *Supra*, note 79, para. 911(h)(iv).

105 Ind. Code Ann. 35-45-7-1 to 35-45-7-4.

106 Para. 1962(a).

107 Para. 1963(b).

108 Frohnmayer, *supra*, note 86, at 18.

[109] Supra, note 71, s. 895.05(8)

[110] Ibid., s. 895.07.

[111] See proposed Illinois Statute, c. 38, para. 49.11(d), (c).

[112] Supra, note 71, s. 895.08(1).

[113] Ibid., s. 895.08(3).

[114] Ibid., s. 895.08(4)(a).

[115] Ibid., s. 895.07.

[116] Ibid., s. 895.05 (2)(b) 1.

[117] Ibid., s. 895.05 (2)(b) 2.

[118] Supra, note 70, s. 9, 10.

[119] Supra, note 71, s. 895.05 (3).

[120] Ibid., s. 895.06.

[121] See proposed Illinois Statute, c. 38, para. 49-12.

[122] Ibid., para. 49-13.

[123] Ibid.

[124] Los Angeles Times, May 3, 1982, at 16.

[125] Linda Koenig and Doris Godinez-Taylor, "The Need for Greater Double Jeopardy and Due Process Safeguards in RICO Criminal and Civil Actions", 70 Cal. Law Rev. 724, at 773-775 (1982).

[126] The National Law Journal, July 5, 1982, at 8, quoting Professor G. Robert Blakey.

[127] Los Angeles Times, May 3, 1982, at 16, quoting Frank Murray, Head, Arizona Civil Racketeering Division.

[128] Supra, note 71, s. 895.05(5).

[129] Ibid., s. 895.05(6).

[130] Supra, note 70, s. 6(a)(2).

[131] Ibid., s. 6(a)(4).

[132] Supra, note 73, s. 842-8(b).

[133] Supra, note 77, s. 30-42-6 B.

134 Supra, note 79, s. 911(d)(2).

135 Supra, note 80, s. 7-15-4(b).

136 Supra, note 71, s. 895.05(3), (4).

137 Ibid., s. 895.05 (2)(b).

138 Ibid., s. 895.05 (7)(b).

139 Supra, note 72, s. 26-3405.

140 Ibid., s. 26-3405(c), (d).

141 Ibid., s. 26-3405(f)(3).

142 Ibid., s. 26-3405(d)(1).

143 Supra, note 71, s. 895.05(b), (c).

144 Ibid., s. 895.05(d), (e).

145 Assembly Bill No. 6315, 206th Leg. Sess., 1983, New York, Introduced: March 24, 1983.

146 Ibid, s.1 of the Enacting Legislation. All references hereinafter are to Bill 6315 as introduced in the New York Assembly.

147 s.460.00(4)

148 s.460.00(9)

149 s.460.00(5)

150 s.460.10

151 s.460.10(3)

152 s.460.20(1)

153 s.460.20(1)(c)

154 s.460.20(4)

155 s.460.20(6)

156 s.460.30(9)

157 s.460.30(8)

158 s.460.30(5)

159 s.460.30(1)

160 s.460.30(3)

161 s.460.30(4)

162 s.460.30(5)(a)

163 s.460.30(7)

164 s.460.30(6)

165 s.460.30(5)(b)

166 s.460.40(9)

167 s.460.40(7)

168 s.460.50(4)(a)

169 s.460.60(1)

170 s.460.70(1)

171 s.460.80(1)

172 s.460.80(4)

173 s.450.25

APPENDIX "E"

Case Law Interpretation of RICO

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United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980)

Leslie Anderson was the county judge for Sharp County, Arkansas. Leonard Mooney was the county judge for Fulton County, Arkansas. Among their functions, they were responsible for approving and authorizing payment of bills and accounts. Paul Baldwin, a salesman, entered into separate agreements with both Mooney and Anderson to defraud their respective counties. They would give fake receipts to Baldwin that recorded sales of merchandise, when in fact, none had been received. In return, Baldwin would give them half of the payment he received from the county for this non-existent merchandise. The evidence showed that neither Mooney nor Anderson knew that the other had entered into a similar agreement with Baldwin.

Mooney and Anderson were charged with violation of section 1962(c) of RICO, in that they conducted the affairs of an enterprise through a pattern of racketeering activity. The enterprise was held to be the illegal agreement entered into by Baldwin, Mooney and Anderson. The two county judges were also charged with conspiracy to violate RICO, 1962(d). They were convicted of these and related charges. Anderson was sentenced to imprisonment for one year with an added two years probation, and received a $5,000 fine. Mooney was sentenced to six months imprisonment, received two years of probation and was fined $7,000. The two men appealed their convictions to the U.S. Court of Appeals, Eighth Circuit.

The Appeal Court held that the existence of the enterprise must be proven to permit a conviction under RICO. Proof of the existence of a pattern of racketeering activity is not proof of the existence of an enterprise. There must be evidence, separate from the pattern of racketeering activity, that proves the existence of an enterprise. The Appeal Court further held that the trial court was wrong to label the association between Baldwin, Mooney and Anderson an enterprise, because there was no evidence to support this assertion.

The Court also pronounced that to obtain a conviction under the RICO conspiracy subsection, 1962(d), there had to be proof of the existence of an enterprise. The proof of the existence of a conspiracy was not proof of the existence of an enterprise. The proof of the conspiracy had to be separate from the proof of the enterprise, since the conspiracy was aimed at the enterprise. Therefore the trial court had erred, because there was no proof of the existence of an enterprise apart from the proof of the conspiracy.

Both RICO convictions were therefore overturned.

United States v. Barton, 647 F.2d 224 (1981)

The defendants were part of an underworld faction which was trying to seize control of gambling and other illegal activities in the Rochester area from a rival group headed by Salvatore Gignello. Between December 1977 and April 1978, W. Barton, D. "Sonny" Celestino, A. Vaccaro and F. Frassetto made several attempts at killing Gignello by using bombs. They finally succeeded when they exploded a bomb under Gignello's car. R. Chirico had engaged R. Starkweather to assemble these bombs.

Following Gignello's death, the accused turned their attention to the two gambling operations run by Gignello's associates. The "Social Club of Monroe" was bombed by Starkweather and Celestino on May 19 and June 8. The "1455 Social Club" was bombed by Frassetto, Celestino and Starkweather on May 22.

On June 18, 1978, Celestino and Frassetto were arrested. Several attempts were made in the following days to dispose of the evidence linking them to the bombings. On June 28, Betti Frassetto attempted to move a truck that contained incriminating evidence, and later on that same day, Starkweather and A. Chirico were arrested by federal agents while removing explosives from the truck.

W. Barton, A. Chirico, R. Chirico, D. "Sonny" Celestino, F. Frassetto and A. Vaccaro were charged under section 1962(d) of RICO, with conspiracy to violate section 1962(c) of the statute. They were also charged with many other offenses including possession of explosives, malicious damage to buildings and obstruction of justice. They received the following sentences for their conviction under RICO:

W. Barton - 5 years;
A. Chirico - 15 years;

R. Chirico - 20 years;
Celestino - 20 years RICO, 30 years total;
F. Frassetto - 20 years RICO, 30 years total;
Vaccaro - 20 years RICO, 25 years total; and
B. Frassetto - 2 years for non-RICO crime.

They appealed their conviction to the U.S. Court of Appeals, 2nd Circuit.

The court distinguished the RICO conspiracy section from the general conspiracy statute. The court held that while the general conspiracy statute required proof of an overt act, the RICO conspiracy section did not. The RICO conspiracy count required proof of an agreement to commit racketeering offenses, and, in order to establish a pattern of racketeering, required proof of an agreement to perform at least two of the racketeering offenses. Therefore, all that was needed to convict someone of conspiracy to violate RICO was proof of agreement to commit two racketeering offenses, whether or not they were actually committed.

The court also held that the RICO conspiracy section was a different offense from the general conspiracy statute. A person could therefore be charged and convicted under two conspiracy counts and receive consecutive sentences.

All sentences were affirmed.

United States v. Campanale, 518 F.2d 352 (1975)

Enrico Campanale and Donald Matthews were part owners of Pronto Loading and Unloading Company. Archie Galea, Mike M. Grancich, Anthony Jayich, and Peter Macht were members of Meat and Provisions Drivers, Teamsters Local 626. These six defendants were part of an extensive extortion conspiracy between 1968 and 1972. Pronto's owners bribed the officials of Local 626; in return these officials used their influence to intimidate and force the meat packers in the area to contract only with Pronto. The defendants extorted money from some of Pronto's competitors as payment for letting them stay in business. The other competitors were forced out of business.

The defendants Campanale, Matthews, Galea, Grancich were charged with conspiracy, Section 1962(d), to conduct the affairs of Pronto and Local 626 through a pattern of racketeering activity, Section 1962(c). In addition, Galea, Grancich, Jayich and Macht were charged with conspiracy, Section 1962(d), to conduct the affairs of Local 626 through a pattern of racketeering activity, Section 1962(c). (The court rejected this second charge because the prosecution had not proven that this was a different and separate conspiracy from the first). They were convicted and appealed their conviction in the U.S. Court of Appeals, 9th Circuit.

The court decided that application of RICO was not limited to organized crime, but extended to anyone who engaged in those prohibited activities. The definition of the concept "person" extends to "any individual or entity". The words of the statute are general, and contain no restrictions to particular persons. Therefore this statute applies to corrupt businessmen and labor officials.

The convictions were affirmed.

United States v. Cappetto, 502 F.2d 1351 (1974)

In 1973-74, Joseph Corabi, Stanley Mikolajczak and Thomas Wilson used a building in Chicago and the telephone located there to receive horse race and sports wagers and to transmit wagering information. This activity took place with the knowledge of the owner of the building, Leonard Cappeto. Several other defendants, some known only by their nicknames, placed bets for other persons with the defendants.

Cappetto, Corabi, Mikolajczak, Wilson and others were charged with violations of RICO Section 1962(d), conspiracy to violate RICO Sections 1962(b) and 1962(c), and substantive violations of 1962(c) and Section 1962(b): acquiring or maintaining an interest in a enterprise (illegal gambling operation) through a pattern of racketeering activity (illegal gambling); and Section 1962(c): conducting the affairs of the enterprise through a pattern of racketeering activity. The government decided to pursue the defendants under the civil provision of RICO Section 1964. In addition to preliminary and permanent injunctions restraining the defendants and those acting in concert with them from engaging in the illegal gambling operation, the prosecution sought divestiture by defendant Cappetto of his interest in the building; disclosure of the identities of those persons acting in concert with defendants in the gambling business complained of, including those known to the government only by nickname; and an order directing each of the defendants to submit to the U.S. Attorney, for a period of ten years, sworn quarterly reports stating current address, business, sources of income and other information deemed necessary.

The defendants appealed a preliminary injunction against further gambling, as well as a related default order and a contempt order. The appeal was heard by the U.S. Court of Appeals, 7th Circuit.

United States v. Cappetto (cont'd)

The Court held that an illegal gambling operation could be an enterprise since the RICO statute applies to illegitimate as well as legitimate enterprises.

It also held that the government could use the civil provisions of RICO to obtain divestiture of an interest held in an illegal enterprise in violation of RICO.

The defendants' motion was rejected.

United States v. Computer Sciences Corp., 511 F.Supp. 1125 (1981)

The facts in this case have not been clearly ascertained since all the charges against CSC and the six individual defendants were dismissed.

The government indictment alleged that the defendants bribed a federal GSA contracting officer by employing him, after making sure that CSC was awarded the National Teleprocessing System (NTS) contracts and that CSC and co-defendants purposely overbilled the U.S. government under the contract through a scheme designed to confuse the government as to how much would be charged for each "system resource unit"-- the measure used to charge for computer use. The alleged bribery took place in 1971 or 1972. The indictment alleged that the defendants altered the method of calculating SRU's in order to increase the charges to the government. The defendants were also alleged to have fraudulently increased the cost of the "software" by fifty percent by falsely claiming that a new software package was an improvement over the old one.

The defendants argued that the conduct alleged as fraudulent was authorized by a reasonable interpretation of the contract. The court said that the NTS contract was "complex, highly technical", but saw no purpose in examining it.

All the defendants were charged with conspiracy to violate RICO, Section 1962(d), and with the substantive violation of 1962(c), conducting the affairs of an enterprise through a pattern of racketeering activity. The alleged pattern of racketeering activity included bribery, mail fraud, wire fraud and false claims. CSC was also charged under Section 1962(a), investing money obtained through a pattern of racketeering activity in an enterprise, i.e., "Infonet", the unincorporated division of CSC that was awarded the contract, and which was therefore liable for forfeiture under Section 1963(a).

All charges were dismissed by the court before the trial.

The court decided that "Infonet" was not an enterprise as defined in the RICO statute. Infonet had no legal existence separate and apart from CSC, being only one of CSC's unincorporated division. The court adopted a restrictive interpretation, that an organization can only be an enterprise if it fits into one of the categories listed in the "enterprise" definition, under Section 1961(4). Thus CSC and the other defendants could not be "a group of individuals associated in fact", which would make them a enterprise, because Section 1961(3) defines "person" as "any individual or entity capable of holding a legal or beneficial interest in property". This definition indicates clearly that in this act "individual connotes a living person". Therefore the charge against CSC under 1962(a) was dismissed because Infonet is not an enterprise.

The court also dismissed all the mail fraud and wire fraud charges because they were not supported by the facts. Without the charges to establish a pattern of racketeering activity, the other RICO charges were also dismissed.

United States v. Dean, 647 F.2d 779 (8th Cir. 1981)

Defendant received several bribes and repeatedly violated the Travel Act, during 1971-78, while he was a county manager. One RICO count involved his transactions with B; another RICO count involved his transactions with P. Both RICO counts were under Section 1962(c)-- conducting the affairs of an enterprise (county manager's office) through a pattern of racketeering activity (the alleged bribery and Travel Act violations).

Defendant argued on appeal that conviction on both RICO counts would amount to double jeopardy, because both counts alleged the same offence-- participation in the same "enterprise" (county manager's office), through the same "pattern of racketeering activity", (bribery and kickback pattern). In effect, defendant was arguing that the RICO unit of prosecution should be the "enterprise"-- i.e. no more than one RICO violation count for one enterprise.

The Court of Appeal noted that the language of RICO does not specifically reveal what Congress saw as the appropriate unit of prosecution, but the legislative history of RICO indicated that Congress by means of the RICO statute sought to address the public evil of using a pattern of racketeering activity as a means of operating an enterprise. Therefore, it disagreed with defendant's argument and held that the RICO unit of prosecution is "the number of distinct patterns of racketeering the defendant was involved in through the enterprise". Dean was involved in two RICO violations, one racketeering pattern with B and another one with P.

The Court of Appeals held that to distinguish a "pattern" of unlawful acts, it should look at five factors:

1) time within which the various activities took place;
2) identity of the persons participating;

United States v. Dean (cont'd)

3) statutory offences charged;
4) nature and scope of the activities;
5) locations of the activities.

Applying these criteria to Dean's situation shows there were two distinct patterns of racketeering activity. This case is important because it shows:

1) a separate RICO violation will attach to each distinct pattern of racketeering activity;
2) the five factors the court used to find a "pattern" indicate that there must be some common scheme, motive or logical relationship between individual criminal acts before a "pattern" of racketeering activity will be found to exist.

United States v. Elliott, 571 F.2d (5th Cir. 1978)

Between 1970 and 1976, an informal association was established between a group of persons with the purpose of profiting from criminal activity. They performed various crimes, some on a regular basis, some on a random basis. J.C. Hawkins, R.E. Delph, Jr., and J.F. Taylor furnished counterfeit titles to, and helped to dispose of cars stolen by a major car theft ring operating in the Atlanta area. J.C. Hawkins, R. Hawkins, Delph and Taylor regularly bought and sold narcotics. W.M. Foster paid J.C. Hawkins and R. Hawkins to burn down a nursing home, so that Foster's construction company could rebuild it. J.C. Hawkins stole or bought stolen items such as trailerloads of meat, dairy products or shirts, and construction equipment. R. Hawkins, murdered J. Reeves, who was a witness in the robbery trial of J.C. Hawkins. The organization was very informal, indeed some of the defendants did not know each other and never committed any criminal acts together. This network was composed of the six defendants and 37 unindicted co-conspirators who got together in small groups of two or three to perform random criminal activities as the opportunity appeared, although some crimes such as the disposal of stolen cars and drug trafficking were more regular and well organized.

J.A. Elliott, Jr., Delph, Taylor, Foster, J.C. Hawkins and R. Hawkins were charged under RICO Section 1962(d) and with conspiracy to violate section 1962(c) of the statute. J.C. Hawkins and R. Hawkins were also charged with the substantive violation of Section 1962(c). The defendants were found guilty of these and other charges and the following sentences were imposed:

J.C. Hawkins - 80 years imprisonment;
R. Hawkins - 50 years imprisonment;
R.E. Delph, Jr., and J.F. Taylor - 10 years each with eligibility for parole in 24 months;

United States v. Elliott (cont'd)

W.M. Foster - 1 year imprisonment and 5 years probation; and

J.E. Elliott - 5 years probation.

The defendants appealed their conviction before the U.S. Court of Appeals, 5th Circuit. The court decided that the network of personal relationships linking the six defendants was an enterprise as defined in the RICO statute. It was a group of individuals associated in fact to commit illegal acts. The court also decided that, unlike traditional conspiracy law, RICO did not require proof that the six defendants had agreed together to commit a particular crime. To be convicted of a RICO conspiracy, a member only has to show, through his words or his actions, his willingness to participate in the affairs of the enterprise by committing at least two racketeering offences. The co-conspirators do not need to be related to each other beyond the fact that they further the affairs of the enterprise.

All sentences were affirmed except for J. Elliott whose conviction was overturned for lack of evidence.

United States v. Frumento, 563 F.2d 1083 (1977)

John R. Sills was in charge of patronage for Peter Camiel, Chairman of the Philadelphia Democratic Committee. Andrew Millhouse was the supervisor of the District II office of the Pensylvania Department of Revenue's Bureau of Cigarette and Beverage Taxes. As the district supervisor, Millhouse had direct administrative control over all the investigators in the district which comprised the Philadelphia area.

In 1971, Sills helped to get Rocco Frumento a position with the "Bureau". Sills, Frumento, Vito Pisciotta and Harold J. Sharp, a Philadelphia cigarette wholesaler, conspired to import large quantities of untaxed cigarettes into Pennsylvania and to affix counterfeit Pennsylvania tax stamps to them. They would then be sold by Sharp. The smuggling operation commenced in August 1971, Sills, Frumento and Pisciotta each receiving $1000 weekly. After several weeks, Millhouse was offered, and accepted, the opportunity to participate in the operation in return, he received $500 a week. The operation came to an end in March 1972 with the arrest of Sharp. In May 1972, Sills, Millhouse and Frumento were charged under Pennsylvania criminal laws with bribery, extortion, and conspiracy, respectively. They were found not guilty at their trial in June 1972.

In May 1975, Millhouse and Sills were indicted in U.S. District Court. Sills was charged with conspiracy to violate Section 1962(c) but not with the substantive offense. Millhouse was charged with violating both the conspiracy provisions of Section 1962(d) and the substantive offense described in Section 1962(c). Both were charged with filing false income tax returns. They were tried, along with Frumento and were found guilty on all counts.

United States v. Frumento (cont'd)

The court held that the defendants could be charged under the RICO statute even if they had been acquitted in state courts of the crimes constituting the pattern of racketeering activity. The RICO statute forbids racketeering, but not the state offenses. The state offenses referred to in the Federal act serve only to define racketeering activity.

The court disagreed with the decision in U.S. v. Mandel, and ruled that the Bureau of Cigarette and Beverage Taxes was an "enterprise" as defined in the RICO statute. In the court's opinion, Congress adopted RICO to protect all legitimate organizations, including government departments, against infiltration by racketeers.

The convictions were upheld.

United States v. Gambino, 566, F.2d 414 (1977)

Joseph Gambino and Carlo Conti controlled certain stops for private garbage collection in the Bronx but were unable to get a carting license from the City. Gambino and Conti maintained control of garbage collection in Coop City and other areas of the Bronx by threatening to kill competitors and by administering beatings. This included an assault on an undercover agent of the FBI who was posing as a cart man and who had solicited a stop in Coop City. They arranged for Terminal Sanitation, a licensed private sanitation firm owned by Peter and Anthony Darminio, to collect at all of the stops which Gambino had previously acquired in the Bronx. The Darminios were required to "kick back" to Gambino one-third of all the monies they received from servicing the stops. Gambino also engaged in extensive loansharking activities, lending a total of $90,000 to the Darminios in 1970 and 1971 and $75,000 in 1972. These loans were collected by Gambino and Conti through the use of threats and violence.

Gambino and Conti were convicted under RICO Section 1962(b), in that they acquired and maintained an interest in an enterprise through a pattern of racketeering activity or collection of an unlawful debt. The "pattern of racketeering activity" was composed of the substantive crimes, extortion and extortionate credit transactions. Through these connected offences, Gambino acquired or maintained an interest in, or control of an "enterprise" (Terminal Sanitation).

The convictions were affirmed by the Court of Appeals.

United States v. Huber, 603 F.2d 387 (1979)

In October 1971, Karl Huber and his father obtained control of Hospital Equipment Company (HEC), an established New Jersey hospital supply house. HEC, through its contract division, Medical Facilities, and a series of corporate successors: Debs, HF/MF and Boden, entered into a number of cost-plus contracts with hospitals in New York and New Jersey for the sale of hospital and surgical supplies, furniture and equipment. The price consisted of the manufacturer's invoiced costs to HEC plus a specified mark-up of 5 to 8 percent, and the net cost of freight.

Shortly after the Hubers acquired HEC and at their specific direction, HEC employees Conroy and Eckert began to inflate the manufacturers' costs quoted to the hospitals. The hospitals were also charged for freight not actually incurred. As a result of these fraudulent practices, HEC and Medical Facilities received an effective mark-up of roughly between 18 and 29 percent rather than the 5 to 8 percent specified in the contract. The fraudulent overcharges totalled nearly $471,000.

Karl Huber was convicted of conspiracy to defraud the United States, make false statements to a government agency and to use the mails to further the frauds; 19 counts of making false statements to a government agency; 8 counts of using the mails to defraud; 1 count of making a false statement to a grand jury and 1 count of conducting the affairs of an enterprise through a pattern of racketeering activity, under RICO, Section 1962(c).

The jury returned a special verdict in which it found that the "enterprise" consisted of the following entities wholly owned by Huber: Tudor Inc., Boden Inc., Atlantic Medical Corporation, Hospital Equipment Company (HEC), Debs Hospital Supplies, Inc. (Debs), Medical Facilities, and Hospital Furniture/Medical Facilities (HF/MF).

Huber was sentenced to four years and fined $108,000 on the other convictions. On the RICO count, the judge ordered conditional forfeiture of Huber's enterprise unless he paid cash or property valued at $100,000 to the U.S. Attorney General within 6 months. Huber was also required to pay the costs of prosecution--$19,412,72. Huber's father was given a separate trial because of ill health. Conroy and Eckert pleaded guilty to conspiracy, false statements, and mail fraud, and were sentenced to 6 months imprisonment, 3 years probation and a $25,000 fine.

The appeal court held that a group of corporations could be an enterprise as defined in RICO Section 1961(4). Although "group of corporations" is not included in the definition, the definition of "enterprise" is a list which begins with the word "includes". This indicates that the list is not exhaustive but merely illustrative of the will of Congress. The aim of the Act and the fact that Congress wanted the Act to be "liberally construed to effectuate its remedial purposes" show that a group of corporations can be an enterprise.

Furthermore, each corporation owned by Huber could be found to have been part of the "enterprise" only if there was evidence that the affairs of that enterprise had been conducted through a pattern of racketeering activity. The evidence at the trial showed that all seven corporations owned by the defendant had been conducted through a pattern of racketeering activity at one time or another.

The Court further held that the forfeiture sanction was not so harsh as to constitute cruel and unusual punishment in violation of the Eighth Amendment of the Constitution. However, this is only in the case where the forfeiture is based on the magnitude of the defendant's criminal enterprise, as it is under RICO. It could constitute cruel and unusual punishment if it threatened to disproportionately reach the untainted property of a defendant. Section 1963 permits a court to untangle the tainted from the untainted property to prevent such a result.

Huber's conviction on the RICO counts was upheld on appeal.

United States v. L'Hoste, 609 F.2d 796 (5th Cir. 1980)

L'Hoste gave several gifts and kickbacks to some municipal officials responsible for the awarding of construction contracts. During the period of the kickbacks and gifts, the R.J. L'Hoste Co., Inc. received construction contracts of nearly $5 million, for work worth substantially less than the contract price paid.

The jury found that L'Hoste's interest in R.J. L'Hoste Co., Inc. gave him a source of influence over the enterprise which he established, operated, controlled,... or participated in the conduct of, in violation of RICO Section 1962(c). The district court judge sitting at the trial concluded that he had the discretion to decline to order forfeiture, and did decline on the basis that a forfeiture would adversely effect the 3rd party interest of Mrs. L'Hoste in her husband's company.

On appeal, with respect to the RICO forfeiture provisions, the prosecution petitioned the Court of Appeal for a writ of Mandamus compelling the district court to order the forfeiture under RICO Section 1963. The Appeal Court held that:

1) When the jury decided that L'Hoste's interest in R.J. L'Hoste Co., Inc. gave him a source of influence over the enterprise which he established, operated, controlled,... or participated in the conduct of, in violation of RICO Section 1962, the jury in effect found that L'Hoste's interest was subject ot forfeiture under RICO Section 1963 (at 813).

2) The district court judge sitting at trial did not have the discretion to decline to invoke the forfeiture provisions of RICO. According to the language of

United States v. L'Hoste (cont'd)

Section 1963, the Attorney General, not the court, has the power and discretion involving the remission and mitigation of forfeiture (at 812).

3. The trial judge's concern for the protection of innocent 3rd parties (Mrs. L'Hoste) is provided for in Section 1963(c). Responsibility is placed in the Attorney General, not the court, to alleviate potential hardship for third parties holding an interest in forfeited property. Therefore, if Mrs. L'Hoste had an interest in property subject to RICO forfeiture she should address the Attorney General. (at 812)

4. The trial judge did not have discretion under s. 3651-s. 3656 Federal Probation Act, 18 U.S.C.(1976), to suspend the RICO forfeiture. There is no indication that Congress intended the Federal Probation Act suspension of forfeiture provisions to apply to criminal forfeitures under RICO (at 814).

N.B. This case established that the RICO forfeiture provision is MANDATORY once conviction is attained. A court has no discretion to decline to invoke forfeiture once the defendant is convicted.

United States v. Mandel, 415 F.Supp. 997 (1976)
591 F.2d 1347 (1979)
602 F.2d 653 (1979)

Marvin Mandel was the Governor of the State of Maryland. Mandel used his powers and his influence to channel State business to business entities in which defendants Hess, W. Rodgers and H. Rodgers had financial interests. Mandel also used his influence to assist legislation which would be beneficial to the owners of Marlboro and Bowie Race tracks. These race tracks were owned by Hess, Kovens, Cory, W. Rodgers and H. Rodgers, who devised a scheme to keep this fact hidden from the public and that State. In return, Mandel received many benefits, financial and otherwise, from the defendants. Hess secretly transferred to Mandel 4/9 of Hess's interest in Security Investment Company (SIC). Hess, H. Rodgers and W. Rodgers secretly transferred to Mandel a 15% interest in Ray's Point, Inc.

Mandel was charged, under Section 1962(b) with acquiring and maintaining an interest in an enterprise, SIC, through a pattern of racketeering activity. He was also charged under Section 1962(c) with conducting and participating in the affairs of an enterprise, the State of Maryland, through the same pattern of racketeering activity.

Hess, W. Rodgers and H. Rodgers were charged with conducting and participating in the conduct of the affairs of SIC through a pattern of racketeering activity, in violation of Section 1962(c). Hess, W. Rodgers, H. Rodgers, Kovens and Cory were charged with conducting the affairs of Marlboro and Bowie race tracks through a pattern of racketeering activity in violation of RICO Section 1962(c).

The court held that the aim of the act was primarily to curb organized crime, but was not limited only to this class of persons and applied to anyone who violated its provisions.

United States v. Mandel (cont'd)

The court also held that the State of Maryland was not an "enterprise" as defined by the statute. The legislative history and the nature of the RICO act show that it was not intended to apply to governments. Therefore the charge against Mandel under Section 1962(c) was dismissed.

Mandel was found guilty of the Section 1962(b) charge and 15 counts of mail fraud. He received a 4 year sentence. Hess, W. Rodgers and H. Rodgers were acquitted of participating in the conduct of SIC through racketeering. Hess, W. Rodgers, H. Rodgers, Kovens, and Cory were found guilty of conducting the affairs of Marlboro and Bowie race track through racketeering activity, and of 15 counts of mail fraud.

Hess, H. Rodgers, and Kovens received four-year sentences and fines of $40,000. W. Rodgers was given 20 months imprisonment and fined $40,000. Cory received 18 months imprisonment.

Under Section 1963(a), Hess, H. Rodgers and W. Rodgers, Kovens, and Cory forfeited their ownership interest in the Southern Maryland Agricultural Association, which owns the Marlboro and Bowie race tracks.

United States v. Marubeni America Corp., 611 F.2d 763 (1980)

Marubeni America Corporation and Hitachi Cable, Ltd., are engaged in the production and sales of electrical cable. Marubeni is incorporated in the United States. Hitachi is a Japanese corporation. Anchorage Telephone Utility (ATU) is an instrumentality of the Municipality of Anchorage, Alaska. Between the spring of 1970 and September 1978, it invited bids on four contracts to supply it with telephone cable. Marubeni's local representative, Forrest Ellis, bribed Richard McBride, an ATU official, to obtain confidential bidding information on the four supply contracts. Marubeni and Hitachi allegedly used this information to underbid their competitors. Based on their bids, Marubeni and Hitachi were awarded large parts of three supply contracts. The aggregate price of these awards was over $8.8 million. After each award, Ellis received cash payments, supposedly commissions, which the government contends he shared as bribe money with McBride.

The U.S. government asserted that the defendants lowered their bids by offering some types of cable at depressed prices, thereby making their package bids artificially low.

The government also alleged that McBride used his position to insure that ATU would not order the types of cable Marubeni and Hitachi bid at depressed prices. The defendants were charged with 63 counts of mail fraud, wire fraud, interstate travel to commit bribery, conspiracy to commit these offenses and racketeering.

Count 63 charged Marubeni, Hitachi and a corporate officer of each with conducting the affairs of an enterprise through a pattern of racketeering activity in violation of Section 1962(c). It also demanded that Marubeni and Hitachi forfeit to the United States "any and all sums or amount paid or payable" to either or both for their performance of the supply contracts, as provided for in Section 1963(a)(1).

The trial court held that only the "interest in an enterprise" was liable to forfeiture and therefore dismissed the portion of count 63 demanding the forfeiture of contract income. The government appealed this ruling. The appeal court held that only the interest acquired and maintened in an enterprise in violation of Section 1962 was liable for forfeiture, i.e., if the Congress had wanted income from the interest to be liable to forfeiture, it would have said so clearly.

United States v. McNary, 620 F.2d 621 (1980)

McNary was the Mayor of Lansing, Illinois. Between 1968 and 1973, he accepted bribes on several occasions from various developers to influence several rezoning decisions in their favour. He also used his position to extort $20,000 from two developers who were trying to obtain building permits. Between March 1970 and November 1973, McNary received a total of $85,000 from his racketeering activity, $65,000 of which was deposited directly into the bank account of B&M Manufacturing Company which he owned. Between September 1971 and October 1973, he transfered in excess of $105,000 from his B&M account to the account of Ports of Call, a travel agency in which he held a partnership interest.

McNary was charged with, and convicted of, two counts of violating Section 1962(a), and of accepting bribes and extortion. The jury returned a special verdict pursuant to Section 1963(a), directing the forfeiture of McNary's interests in B&M and Ports of Call, because they had been acquired and maintained in violation of Section 1962(a).

McNary's appeal was heard by the U.S. Court of Appeals, 7th Circuit. The court held that B&M and Ports of Call were enterprises as defined in the RICO statute. McNary had invested in those companies using illegally obtained funds in violation of Section 1962(a). Therefore, McNary's interest in these enterprises was liable to forfeiture.

The court further held that it was not necessary to show that the illegal funds had been directly invested into the enterprise. A conviction could be obtained just by showing that the illegal funds had helped indirectly to allow the investment. In this case, the fact that $65,000 in tainted money was deposited in B&M's account and the fact that $105,000 had been transfered from B&M's account to Ports of Call, was enough to prove that the interest in Ports of Call was maintained in violation of Section 1962(a).

The conviction and sentences was affirmed.

United States v. Rone, 598 F.2d 564 (9th Cir. 1979)

Justin Rone and Roy Dupont Little consorted together in a wide range of unlawful activity which included murder and extortion. Rone and Little bragged to Donald Brennan, a Los Angeles area bookmaker, that they had murdered James Rosie, a former associate. Rosie had last been seen in the company of Timothy Mallen who later was killed by an overdose of heroin or morphine. Rosie's body was never found.

Rone collected the amounts owed by Brennan to Rosie and lent large amounts of money to Brennan to cover expenses incurred in his bookmaking operation. Rone also cashed Rosie's monthly Social Security check which was mailed to Brennan's residence. Rone and Little helped to collect the gambling debts which were owed to Brennan. Little visited one individual several times to collect money and threatened to break his legs and to throw him off a fourth floor balcony. Rone and Little also bragged that they had been paid to kidnap and kill Kenneth Whetstone, who was in the steel business. Mounting pressure was applied to Brennan to pay loans owed to Rone, including threats on his life by Rone and Little.

Rone and Little were charged under Section 1962(d) with conspiracy to conduct the affairs of an enterprise through a pattern of racketeering activity, Section 1962(c), the pattern of racketeering activity being three murders and two extortions. They were also charged with other offenses.

The court made three findings:

1) Section 1962(c) applies to any enterprise, legal or illegal, which is conducted through a pattern of racketeering activity. In this case, the "enterprise" was the assiocation between Rone and Little: "two persons associated together to engage in illegal activity".

2) The RICO conspiracy offence, Section 1962(d) and the substantive RICO offence, Section 1962(c), were two separate offenses; therefore the court could impose consecutive sentences for the violation of both these sections. In this case, Rone and Little each received 40 years for RICO offenses. They received the maximum sentence of twenty years each for the violation of Section 1962(c) and 1962(d), the sentences to run consecutively.

3) Separate and consecutive sentences could be imposed for the substantive RICO offense, and the individual crimes used to establish the pattern of racketeering activity. Thus in this case, the pattern of racketeering activity was made up of three murders and two extortions. For this violation of Section 1962(c), they each received a 20 year sentence.

In addition, they were found guilty of the two extortions as separate offenses and were given two consecutive 20 year sentences for each count on top of the RICO sentence of 20 years. Rone also received a 10 year sentence for illegal possession of a sawed-off shotgun. He received sentences totaling 90 years. Little received sentences running a total of 80 years. Their convictions were affirmed on appeal.

United States v. Rubin, 559 F.2d 975 (1977)

Bernard G. Rubin was President of the Southwest Florida Laborer's District Council, an umbrella organization supervising various locals. He was president of the Concrete Products & Materials Yard Workers Local #666, Business Manager of Local #478, Special International Representative of the Laborer's International Union of North America, as well as a trustee of several labor trust funds. He embezzled funds from the various unions and trust funds by submitting duplicate expense vouchers, mostly for travel and entertainment, thereby receiving multiple reimbursements for expenses incurred. He granted himself over $300,000 in unauthorized salary increases as an officer of Local 626 and the District Council.

Rubin was found guilty of 103 separate counts, including embezzlement, false statements on income tax return, and Section 1962(c), conducting or participating in the conduct of the union organizations through a pattern of racketeering activity. He received concurrent sentences on all counts up to a maximum of 5 years imprisonment, and fines of $50,000. He was also ordered to forfeit all his union and trust fund positions as well as his right to seek such positions in the future.

On appeal, the court held that under Section 1963, the union and trust fund positions were forfeitable interests since the goal of Congress was to separate persons who run an enterprise through racketeering activity from the enterprise as such. However, RICO did not forbid Rubin from attempting to regain these positions in the future and the courts could not forbid him to do this.

United States v. Scotto, 641 F.2d 47

Scotto was the President of a New York union local. From 1975-1979 he demanded and received a series of illegal labour payoffs from shipping companies. In return he was to insure labour peace, control fraudulent workmen's compensation claims, and assist some companies in getting more business.

Scotto and another were charged with the substantive crimes of income tax violations, accepting illegal labour payments and under RICO Section 1962(c) with "conducting the affairs of an enterprise through a pattern of racketeering activity". The "enterprise" was construed by the prosecution as the defendants using their positions as officers of the union to demand and receive illegal payments. This enterprise was conducted through a pattern of racketeering activity-- the repeated acceptance of illegal labour payoffs. At trial Scotto was convicted of all charges.

On appeal, with respect to RICO, Scotto argued that the trial court erred in law in holding that he had "conducted the Union's affairs through a pattern of racketeering activity". He contended that a sufficiently clear relationship between the substantive misconduct (the acceptance of illegal labour payments) and the conduct of the enterprise (the Union, and his position within the Union) was not proven. He submitted that in order to find that the affairs of the Union were conducted through a pattern of racketeering it must be proved beyond a reasonable doubt that there was a connection between the so-called acts of racketeering and the affairs of the Union, and only if the connection were proved could a conviction under RICO Section 1962(c) be sustained.

The Court of Appeals, in rejecting Scotto's arguments stated that:

> "one conducts the activities of an enterprise through a pattern of racketeering

United States v. Scotto (cont'd)

> when, (1) one is enabled to commit the predicate offences solely by virtue of his position in the enterprise [union], or involvement in or control over the affairs of the enterprise, or (2) the predicate offences are related to the activities of the enterprise" (at 54)

The court also held that committing criminal acts that are unrelated to the enterprise or to one's position within it would not be a RICO violation. RICO requires a relationship between the criminal acts, and the defendant's position within the union--but RICO does not require "proof of the advancement of the Union's affairs by the defendant's activities, or proof that the Union itself is corrupt or proof that the Union authorized the defendant to do whatever acts form the basis of the [RICO] charge. It requires only that the government establish that the defendant's acts were committed in the conduct of the Union's affairs". [the court quoting from U.S. v. Field, 432 F.Supp. 55 at 58]

Further, the court did not find it necessary for the defendant to solidify or otherwise enhance his position in the enterprise through commission of the criminal acts.

N.B. This case is an example of the broad test of the Section 1962(c) "through" requirement. The prosecution need not prove that the pattern of racketeering activity advances the affairs of the enterprise. It is only required to prove a nominal relationship between the criminal acts and the enterprise.

United States v. Starnes, 644 F.2d 673 (1981)

Starnes was President of Tri-No Enterprises, Inc., which was housed in a building in Herrin, Illinois. Starnes arranged with Roland to set fire to the building. He had increased his insurance coverage on the building. Roland hired Shurman and Murphy to set the fire.

Starnes and Roland were found guilty of violating Section 1962(d), conspiracy to engage in a pattern of racketeering in connection with a scheme to commit arson with intent to defraud an insurer. They were each sentenced to six months imprisonment and fined $5,000 on the RICO charge.

The court held that a single scheme to commit arson could be a pattern of racketeering activity if several acts of racketeering activity were committed in carrying out the scheme. In this case the acts were 1) Roland, Shurman, and Murphy, travelling across state lines from Indiana to Illinois to set the fire; 2) actually committing arson with intention to defraud; 3) using the mails to complete the scheme of defrauding the insurance company.

The court held that the "enterprise" was Tri-No Enterprises, Inc. Starnes participated directly in the enterprise, since he was president of Tri-No and the arson conspiracy affected business property and insurance coverage. Roland participated indirectly in Tri-No's affairs because the damage to the building was meant to affect the conduct of the corporate business.

The convictions were upheld on Appeal.

United States v. Stofsky, 409 F.Supp. 609 (1973)

Defendants were officials of a trade union, and were charged with conspiracy to accept illegal payments from employers, accepting such payments, tax evasion, and conducting union affairs through a pattern of racketeering activity (Section 1962(c)).

Defendants argued that Section 1962(c) was unconstitutional because it was vague--it failed to set out clearly the degree and intensity of the connection or relationship required between the racketeering activity and the usual operation of the enterprise. Without a clear definition of what the relationship between the racketeering and the conduct of the enterprise must be, a prospective defendant cannot predict with any certainty what conduct on his part might be unlawful. By the precepts of constitutional law, criminal statutes are required to have definite language, and therefore Section 1962(c), to be valid, must state whether or not the alleged racketeering "must be in furtherance of the enterprise; or if it need be merely not harmful to the enterprise,... or if it need be only random and barely related to the usual operation of the enterprise" (at 612).

The court held that the language of Section 1962(c) is not vague. It found that the language was broad, and that the Congress meant it to be broad, so as to cover the many and various ways in which legitimate businesses and activities are corrupted by criminal activity. Therefore the court found that "through a pattern of racketeering activity" could mean the several different ways criminals may use an enterprise.

The court held that the word "pattern" means that the racketeering acts are required to be connected with one other by some common scheme, plan or motive so as to constitute a pattern and not simply a series of disconnected acts. (at 614) Therefore in this case, although the defendant's racketeering activities actually did harm to and were completely antithetical to the union, the defendants had nonetheless operated the union (enterprise) through their racketeering activities.

The convictions were upheld on appeal.

United States v. Sutherland, 656 F.2d 1181 (5th Cir. 1981)

Defendants were charged and convicted of conspiracy to violate RICO. The conspiracy consisted of an agreement to associate with and to participate in the conduct of an enterprise (the Municipal Court of the City of El Paso) through a pattern of racketeering activity (bribery of a state official in violation of state law). Two of the defendants (M. and W.) collected traffic tickets from friends and associates and delivered them to Judge Sutherland who would have the cases transferred to his docket and would then favourably dispose of them. The money collected for the favourable disposal would in each case be split between Sutherland and whichever other defendant collected and delivered the ticket.

On appeal, the defendants, M. and W., argued that since neither of them knew of the other's activities with Judge Sutherland, the conspiracy alleged in the prosecution's indictment did not exist.

The Court of Appeals agreed with the defendants on this point, but held that while there had been an error in the indictment and in the procedural way in which the defendants were tried in the court of first instance, these did not prejudice the defendants substantive rights. Therefore the Court of Appeals declined to reverse the convictions.

What is most important about this decision is that the Court of Appeals used it to restate its opinion as given in U.S. v. Elliot, 571 F.2d 880 (5th Cir. 1978). It said, "What Elliot does state is two-fold:

1) a pattern of agreements that absent RICO would constitute multiple conspiracies may be joined under a single RICO conspiracy count if the defendants have agreed to commit a substantive RICO offence;

United States v. Sutherland (cont'd)

2) such an agreement to violate RICO may, as in the case of a traditional "chain" or "wheel" conspiracy, be established on circumstantial evidence, i.e. evidence that the nature of the conspiracy is such that each defendant must necessarily have known that others were also conspiring to violate RICO".

United States v. Sutton, 642 F.2d 1001 (1980)

At trial defendants were convicted of violating RICO Sections 1962(c) and (d), and the substantive crimes of narcotics trafficking, burglary, possession of stolen property, and other crimes.

The Court of Appeals overturned the RICO conviction (605 F.2d 260(1979)) and held that the statute is limited to proscribing the corruption of legitimate enterprises, therefore the involvement of the defendants in a pattern of totally unlawful activities and unlawful organization(s) would not sustain a RICO conviction. The Court of Appeals sitting en banc voted to vacate the earlier Court of Appeals decision and rehear the case.

The main issue of concern to the en banc court was the question of the ambit of the RICO statute with respect to legal and illegal enterprises. The en banc court held that the statute's application is not limited to legitimate enterprises; illegal enterprises conducted, or controlled...by means of a pattern of racketeering activity came within the ambit of the statute. The en banc court found no ambiguity in the way the term "enterprise" is used in the statute. The section 1961 definition of "enterprise" shows that both legal entities, and "associations in fact though not legal entities (i.e. illegal entities) are included within the definition. Further, Section 1962(c) does not specify "legal enterprise," rather it refers to "any enterprise," i.e., any enterprise whether a legal entity or not. Therefore, there is no basis to interpret RICO as applying only to legitimate enterprises.

The en banc court did not find the terms "pattern of racketeering activity" and "enterprise" to be confusing or overlapped.

United States v. Sutton (cont'd)

The earlier Court of Appeal decision contended that if RICO was read as proscribing illicit business activities the terms "enterprise" and "pattern of racketeering" would be redundant, and any "pattern of racketeering" would ipso facto be an "enterprise" within the Act. The en banc court noted that there is a clear distinction between the two terms. "Enterprise" focuses on an entity, organization or group of persons associated for a particular purpose. "Pattern" doesn't refer to people or their relationships, it denotes a distinctive relationship between criminal acts that are not isolated events. Therefore in this case, "enterprise" refers to the organization in which the nine defendants joined to conduct the organization's affairs. "Pattern of racketeering" refers to the numerous criminal acts committed by the organization.

The en banc court also considered the application of Section 1962(d), RICO conspiracy. It noted there is no requirement in a valid conspiracy conviction that every conspirator must have "agreed, intended to conduct or participated in every crime committed by other co-conspirators if the crime committed was within the scope of the conspiracy which the conspirator was proved to have joined" (at 1015). The court therefore followed U.S. v. Elliott, 571 F.2d 880, at 902-03, and held that under RICO "it is irrelevant that each defendant particpated in the enterprise's affairs through different, even unrelated crimes, so long as we may reasonably infer that each crime was intended to further the enterprise's affairs. To find a single conspiracy, we still must look for agreement on an overall objective."

N.B. The most important point of this case is the decision that RICO applies to both legal enterprises and illegal enterprises that are controlled, or conducted,...by means of a pattern of racketeering activity.

United States v. Swiderski, 593 F.2d 1246 (1978)

Joseph Swiderski, the owner of Sylvester's restaurant in Washington, D.C., carried on a steady traffic in cocaine, sometimes at the restaurant, sometimes at various locations around the city. David McGowan also trafficked in cocaine, sometimes collaborating with Swiderski in buying cocaine, sometimes buying from Swiderski. McGowan knew that Swiderski was trafficking in cocaine at Sylvester's restaurant, and McGowan often bought or sold cocaine at the restaurant.

Swiderski and McGowan were convicted of drug trafficking, conspiracy and of conducting or participating in the affairs of an enterprise through a pattern of racketeering activity, Section 1962(c). Each was sentenced to a substantial term of incarceration.

Their appeal was heard by the U.S. Court of Appeals, District of Columbia Circuit. The appelate court held that Sylverster's restaurant was an enterprise under the definition of the RICO statute, and that this enterprise was engaged in both the food retailing and drug retailing business. The restaurant was a front for the drug business. Swiderski was therefore guilty of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of Section 1962(c). McGowan also was guilty under the same section. The court used the theory laid down in U.S. v. Elliott, to show that McGowan was "associated indirectly" in the conduct of the enterprise. He was associated with the enterprise because he knew that trafficking in cocaine was taking place at the restaurant; and he participated in the affairs of the enterprise through a pattern of racketeering activity.

The sentences imposed by the trial judge were affirmed on appeal.

United States v. Thevis, 474 F.Supp. 134 (1979)

Court ruling on defendant's pre-trial motion to dismiss the indictments. The facts of the case were not given.

The defendants were charged with conspiracy to violate Section 1962(d) and with conducting the affairs of an enterprise (pornography business) through a pattern of racketeering activity.

The court held that the definition of enterprise in the RICO statute, which "includes" any individual, corporation, association, or group of individuals, is broad enough to embrace an enterprise defined as a "group of individuals associated in fact with various corporations".

The court also held that the "interest" in the "enterprise" that can be forfeited is limited to the property or investment acquired or maintained in the enterprise in violation of Section 1962. It does not embrace the "fruits or profits" derived from the operation of the enterprise.

The "enterprise" was an association which was incapable of holding property in its own right. The properties which the individuals and corporations placed in common to further the affairs of the enterprise, while still retaining formal ownership of these properties, constitute the "interest" which is subject to forfeiture.

United States v. Turkette, 101 S. Ct. 2524 (1981)

The important question in this case is whether the term "enterprise" as used in RICO encompasses both legitimate and illegitimate enterprises or is limited in application to the former.

Turkette and twelve others were charged with violation of Section 1962(a)-- conspiracy to conduct and participate in the affairs of an enterprise...through a pattern of racketeering activity. The enterprise was described as, "a group of individuals associated in fact for the purpose of illegally trafficking in narcotics and other dangerous drugs, committing arsons...[and more]". The substantive crimes making up the "pattern of racketeering activity" were trafficking, arson, mail fraud, insurance fraud, etc. The common thread among all the crimes was the defendant's alleged leadership of the criminal organization through which he orchestrated, and participated, in the commission of the various offences charged. At trial, the prosecution focused upon both the professional nature of the defendant's organization, and the execution of a number of distinct criminal acts. Defendant was convicted of all the substantive crimes and the RICO charge.

On appeal, the defendant argued that:

1) RICO was intended solely to protect legitimate business enterprises from infiltration by racketeers;
2) RICO does not make criminal the participation in an association which performs only illegal acts and which has not infiltrated or attempted to infiltrate a legitimate enterprise.

The Court of Appeals agreed with the defendant and overturned the conviction.

The prosecution appealed to the U.S. Supreme Court. The Supreme Court re-instated the conviction and thus held that the term enterprise as used in RICO encompasses both legitimate and illegitimate enterprises:

The Supreme Court reasoned as follows:

a) Neither the language nor the structure of the RICO statute limits its application to legitimate enterprises only. On its face, Section 1961(4) describes two separate categories of associations that come under the term "enterprise"--the first encompasses corporations, partnerships, and other "legal entities" and the second covers, "any union or group of individuals associated in fact although not a legal entity", (i.e. illegitimate organizations are covered here).

b) With respect to Section 1962(c), an enterprise is not a "pattern of racketeering activity" but is an entity separate and apart from the pattern of activity in which it engages. In order to secure a conviction, the prosecution must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity".

c) It would be illogical to confine RICO prosecutions to legitimate enterprises only.

d) Nothing in the legislative history of RICO requires a conclusion that the statute is limited in application to legitimate enterprises. The purpose of RICO and similar statutes is to control organized crime in the

United States v. Turkette (cont'd)

United States, and no distinction is made as to whether the organized crime involves legitimate or illegitimate enterprises.

N.B. The Turkette decision is extremely important because the U.S. Supreme Court definitively decided that RICO applies to illegitimate enterprises and legitimate enterprises.

United States v. Webster, 639 F.2d 174, reheard and reversed en banc 669 F. 2d 185 (1982)

Webster ran a drug distributing operation while Thompson, whom he lived with, ran a night club. One of several charges against them was under Section 1962(c)--conducting an enterprise through a pattern of racketeering activity. They were convicted on the RICO charge and several other charges relating to conspiracy to traffic in illegal drugs. They appealed.

The indictment setting out the offences charged them with operating the night club (enterprise) through a pattern of racketeering activity. The court held the evidence showed that the night club facilities were regularly made available to, and in the service of Webster's drug-dealing business. But the evidence did not show that the affairs of the night club (enterprise) were promoted, or advanced in any way by the illegal drug racketeering.

The prosecution asserted that RICO requires only a "substantial connection" between the racketeering and the conduct of the enterprise's affairs, regardless of which direction the advancement flows--i.e., to get a section 1962(c) conviction it is sufficient to show that the enterprise advances the interests of the racketeering activity.

The appellate court held that Section 1962(c) requires that where a legitimate business is the enterprise the prosecution must prove that the affairs of the enterprise were advanced by racketeering; proving the converse, that the racketeering activities were advanced by the legitimate enterprise, does not satifsy Section 1962(c).

The court reasoned that a broader interpretation of the word "through" would mean that anyone who used income from a legitimate business to participate in racketeering activity would

United States v. Webster (cont'd)

be guilty of a violation of Section 1962(c). The court did not believe that the Congress could have meant the statute to have such a broad scope (at 185).

N.B. This case is an example of the strict test of the Section 1962(c) "through" requirement. The prosecution must prove that the pattern of racketeering activity advances the affairs of the enterprise in question.

United States v. Webster (*en banc* decision)

After giving the above decision, the 4th Circuit Court of Appeals determined to rehear the case *en banc*. In the rehearing the full Court of Appeals reversed the above decision and held that the passive use of a business or office in the alleged drug-dealing activities did come within Section 1962(c) if the business was "an instrument" in the pattern of racketeering activity. In other words, the prosecution need not prove that the enterprise was advanced or profited from the pattern of racketeering activity.

United States v. Weisman, 624 F.2d 1118 (2d Cir. 1980)

Defendant was convicted at trial of one count of operating a theatre through a pattern of racketeering activity, under Section 1962(c), nine counts of securities fraud, nine counts of bankruptcy fraud, and other related crimes. Defendant appealed on numerous grounds, including the RICO count.

The enterprise (theatre) was shown to have been operated through a pattern of fraud from its inception to its collapse. The fraud began in 1973 with the filing of a false and misleading prospectus with respect to a public stock offering to raise money for construction of the theatre. When the theatre began operation the defendant skimmed off theatre revenues from ticket sales and concessions and converted this money to his own use. The skimming operation forced the theatre in 1976 to file a petition of bankruptcy. The theatre was found to be a "debtor in possession" and was allowed to continue operations, but expenditures, etc. were subject to prior approval by the bankruptcy court. The defendant nonetheless continued to secretly skim the receipts, but was discovered.

With respect to the RICO count, the defendant argued that even if it were found that he had committed two or more predicate acts of racketeering within a ten year period, an unlawful "pattern of racketeering" would not be established unless the particular criminal acts (predicate acts) were also found to be "related" to each other through a "common scheme of activity" (Weisman at 1121). Defendant relied upon the holding in United States v. Stofsky, 409 F.Supp. 609, (affirmed on other grounds, 527 F.2d 237), to support his argument. Stofsky, held that though the language of RICO Section 1962(c) did not state that the predicate crimes were required to have some relatedness, the word "pattern" should be construed to require that the predicate acts of racketeering be "connected with each other by some common scheme, plan or motive".

United States v. Weisman (cont'd)

The Court of Appeals believed that even by the Stofsky test the defendant was guilty. The court however refused to accept the validity of this test. Instead, the court noted that the language of the statute does not expressly require the predicate acts of racketeering to be specifically related to each other. Rather, the court thought that the broad spectrum of predicate acts of racketeering outlined in Section 1961(1) belied any intent on the part of the Congress to require the predicate crimes of racketeering to possess a unitary character. The court observed in reading Section 1962(c) that the predicate crimes constituting a "pattern of racketeering activity" must all be done in the conduct of an enterprise. Thus the enterprise per se supplies a significant unifying link between the various predicate crimes listed in Section 1961(1) that may constitute a "pattern of racketeering activity". The court therefore followed the decision in United States v. Elliot, 571 F.2d 880 in holding that in order to fall within RICO the two or more predicate crimes need not otherwise be related to each other, but must be related to the affairs of the enterprise. Therefore, the evidence in respect of the theatre showed that from its inception until its collapse, the affairs of the theatre were conducted through a variety of racketeering activities.

The court also held on another point that conspiracy to commit any of the substantive crimes listed in Section 1961(d) of RICO is a predicate act of racketeering under RICO.

THE RICO STATUTE:

A SELECTIVE BIBLIOGRAPHY

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